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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

WILLIAM J. SCOTT, on his own behalf and on behalf of all persons similarly situated,

Petitioner,

vs.

CITY OF HAMMOND, INDIANA; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; DOUGLAS M. COSTLE, Administrator of the United States Environmental Protection Agency; and the HAMMOND-MUNSTER SANITARY DISTRICT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Where, as here, subject matter jurisdiction is based on diversity of citizenship and the claim for relief is grounded in state law, does the Court of Appeals have the authority under the Tenth Amendment, the Rules of Decision Act, 28 U.S.C. Section 1654, and the decision of this Court in *Erie* v. *Tompkins* to fashion a federal common law choice of law rule to replace the choice of law of the forum state?

2. Where, as here, subject matter jurisdiction is based on diversity of citizenship and the claim for relief is based on state law, did the Court of Appeals err in holding that venue would lie only in the district where the defendant resides, in contravention of the venue statute governing diversity cases which allows venue to exist in the district where the plaintiff resides?

3. Is the state law tort claim preserved by the 1972 Federal Water Pollution Control Act Amendments, which the Court of Appeals held was available to plaintiff under Indiana law, a claim grounded in state law or federal law?

4. If the state tort law claim preserved by the 1972 Federal Water Pollution Control Act Amendments is grounded in federal law, does a federal district court then have federal question jurisdiction over the claim under 28 U.S.C. Section 1331?

5. If the state tort law claim preserved by the 1972 Federal Water Pollution Control Act Amendments is predicated on federal law, does a federal court in applying this "federal" claim have the authority to ignore or disregard either the choice of law or substantive law of the forum state in shaping a "uniform" "federal" common law of liability and relief predicated on federal law?

6. Is a holding that the state law claim preserved by the 1972 Federal Water Pollution Control Act Amendments is grounded in federal law really a holding that a federal common law of tort liability exists—a decision prohibited by this Court's decision in *Milwaukee II*?

7. If the federal court must apply the law of the State of Indiana, should the Court of Appeals have remanded to the district court to apply the choice of law rules of the State of Indiana to determine whether the complaint stated a claim upon which relief could be granted?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PARTIES INVOLVED

The judgment of the Court of Appeals involves several different cases which were consolidated either at the District Court or the Court of Appeals. The instant petition involves only case No. 80 C 4563, in the United States District Court for the Northern District of Illinois, *William J. Scott* v. *City of Hammond, Indiana, et al.*[1]

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[1] This case and *People of the State of Illinois, et al* v. *The Sanitary District of Hammond, et al.*, No. 80 C 4775 in the United

Footnote continued on following page.

This petition involves a diversity action brought by plaintiff and Petitioner William J. Scott, a citizen of Illinois against defendants and respondents the City of Hammond, Indiana and the Hammond-Munster Sanitary District, both municipal corporations and citizens of Indiana.[2]

PETITION

Petitioner William J. Scott prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on March 27, 1984, App. at D-1,[3] as modified by the Court of Appeal's order of May 29, 1984 denying rehearing, App. at B-1.

Footnote continued from preceding page.

States District Court for the Northern District of Illinois, were consolidated in a single appeal, No. 81-2236, before the Seventh Circuit.

In addition, the Seventh Circuit consolidated the "Hammond Cases" involved in No. 81-2236 for argument with *People of the State of Illinois, et al.* v. *Milwaukee,* appeal No. 77-2246 on remand from the Supreme Court of the United States.

The People of the State of Illinois have filed a separate Petition for a Writ of Certiorari from the judgment of the Seventh Circuit in Appeals Nos. 77-2246 and 81-2236.

[2] In a separate count of the Complaint, not involved in the decision of the Court of Appeals below or this Petition, Petitioner Scott sought relief from the United States Environmental Protection Agency and Douglas M. Costle, Administrator of the United States Environmental Protection Agency.

[3] Petitioner William J. Scott hereby adopts and incorporates as the Appendices to this Petition the Appendices to the Petition for a Writ of Certiorari filed by the Petitioners in *People of the State of Illinois et al.* v. *Milwaukee* and *People of the State of Illinois, et al.* v. *Sanitary District of Hammond, et al.* (Seventh Circuit Nos. 77-2246 and 81-2236).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. Section 1292(b). The jurisdiction of the District Court over Petitioner Scott's state law claims was based on the diversity of citizenship statute, 28 U.S.C. Section 1332.

OPINIONS

The March 27, 1984 opinion of the Court of Appeals is not yet reported and is contained in the Illinois Appendices at A-1. The Seventh Circuit's order of May 29, 1984, denying Petitioner William J. Scott's petition for rehearing and modifying the March 27, 1984 opinion is also unreported and is included in the Illinois Appendices at B-1.

The opinion of the District Court in the Hammond case is reported as *Scott* v. *City of Hammond, Ind.*, 519 F.Supp. 292 (N.D. Ill. 1981), and is contained at F-1 of the Illinois Appendices.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI, Section 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTORY PROVISIONS INVOLVED

Relevant statute governing law to be applied:

The Rules of Decision Act, 28 U.S.C. Section 1652

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Relevant statutes relating to subject matter jurisdiction:

Federal Question Subject Matter Jurisdiction, 28 U.S.C. Section 1331(a)

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Diversity of Citizenship Subject Matter Jurisdiction, 28 U.S.C. Section 1332(a)

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States

Relevant statutes relating to Venue:

Venue based on diversity of citizenship jurisdiction, 28 U.S.C. Section 1391(a)

> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, or in which the claim arose.

Venue based on federal question jurisdiction, 28 U.S.C. Section 1391(b)

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

Relevant Statutes or rules relating to *in personam* jurisdiction:

Rule 4(e) of the Federal Rules of Civil Procedure

* * *

Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule.

Illinois Statutes relevant to *in personam* jurisdiction:

Personal service outside state, Ill. Rev. Stat., ch. 110, Par. 2-208

Section 2-208. Personal service outside State. (a) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal service of summons within this State. . . .

Act submitting to jurisdiction—Process, Ill. Rev. Stat., ch. 110, Par. 2-209

Section 2-209. Act submitting to jurisdiction—Process. (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person . . . to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

(2) The commission of a tortious act within this State.

Relevant provisions of the Federal Water Pollution Control Act:

F.W.P.C.A. Section 505(e), 33 U.S.C. Section 1365(e)

Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek other relief (including relief against the Administrator or a State agency).

F.W.P.C.A. Section 510, 33 U.S.C. Section 1370

State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

STATEMENT OF THE CASE

In the summer of 1980, large clumps of fecal matter mixed with industrial grease began washing ashore on Chicago's beaches. These masses floated into the nearshore swimming areas of Chicago's beaches and actually washed onto the beach shore, contaminating the sand with a foul stinking mess.

This contamination of Chicago's Lake Michigan bathing waters and beaches continued for several weeks causing the virtual shutdown of the beaches in the hottest days of the summer. Earlier investigations of shoreline currents had established that contaminants are carried either South or North along Chicago's lakefront depending on the weather; and a detailed hunt for the source of the contamination revealed that Hammond, Indiana, was discharging raw human and industrial waste from a pumping station along the shore of Lake Michigan.

William J. Scott, a Chicago resident and Illinois citizen, brought suit against Hammond and its Sanitary District seeking damages and injunctive relief under Illinois tort common law. The suit was brought on Scott's personal behalf and as a class action on behalf of all other users of the contaminated beaches. Plaintiff sought damages of one million dollars for the weeks of beach closures.[4]

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[4] There are two other counts in Scott's complaint not directly relevant here. In Count II, Scott also claimed that the facts alleged entitled him to recover damages and injunctive relief under the federal common law of nuisance. That count was rendered moot by this Court's decision in *Milwaukee II*.

Scott's complaint also brought a claim (Count III) against the EPA Administrator for failure to establish water quality standards and water quality based effluent limitations to prevent the disgraceful raw sewage situation in Lake Michigan. That count is not involved in this Petition. The only way to prevent raw sewage discharges under the Clean Water Act is through water quality based effluent limitations established pursuant to Section 303(d). 42 U.S.C. Section 1313(d). The key mechanism for such Section 303(d) limits (called total maximum daily loads, "TMDLs") have not been prepared by the states more than 10 years after the statutory deadline. Scott cannot sue the State of Indiana for failure to meet its duty under the Clean Water Act as a result of this Court's decision in *Middlesex County Sewage Authority* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1982), that 42 U.S.C. Section 1983 is not available. Thus, 12 years after the passage of the Clean Water Act the discharge of raw sewage is permitted under the Act.

After Scott filed his complaint with his state law claims based on diversity of citizenship under 28 U.S.C. Section 1332, a subsequently filed state court suit by the State of Illinois and the Metropolitan Sanitary District of Chicago was removed by defendant Hammond from Illinois State Court to the federal District Court. The basis for removal was that the federal common law count provided federal question jurisdiction under 28 U.S.C. Section 1331.

After this Court's decision in *Milwaukee II*, Hammond moved to dismiss Scott's complaint for failure to state a claim upon which relief could be granted. The District Court denied the motion to dismiss and held that Scott had stated a claim upon which relief could be granted under state law.

Because of the importance of the question, the District Court certified its decision for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b). App. at E-1. The Court of Appeals granted the motion for interlocutory appeal and consolidated the Hammond interlocutory appeal with the Milwaukee case.

On appeal, the Seventh Circuit reversed the District Court and held that in the Scott case—a diversity case based on state law—the *only* applicable law was Indiana law and not Illinois law.[5] The Court further indicated that the only venue for an action by Scott in a diversity case based on state law was in a federal district court or in a state court in Indiana where the defendant resided. The Court of Appeals refused to acknowledge that—even if Indiana law was applied—under the whole law of Indiana, the Indiana choice of law rules mandated application of Illinois law. Despite the request of Petitioner Scott to remand to the District Court to apply Indiana law—the choice of law dictated by the Court of Appeals—the Court of Appeals refused to remand. Instead, the Court of Appeals ordered dismissal of the case, thereby denying Petitioner Scott any remedy.

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[5] The decision of the Court of Appeals was by two judges: Judges Fairchild and Cudahy. Judge Sprecher, the third member of the panel, voted to affirm the district court, but died soon after oral argument without writing a dissenting opinion.

REASONS FOR GRANTING THE WRIT

In attempting to reconcile Congress' clear intent to preserve state tort law when it passed the Federal Water Pollution Control Act with the allegedly preemptive effects of a footnote in *Illinois* v. *City of Milwaukee ("Milwaukee I")*, 406 U.S. 91 (1972), the Court of Appeals has rewritten the Constitution and several statutes of the United States. To understand the constitutional dimensions of the Court of Appeals decision one must understand the operative facts of this case:

1. A citizen of one state engaged in tortious acts in one state which caused injury to a citizen of another state in another state.[6]

2. The injured citizen brought suit in the state of the injury seeking recovery under state tort law.

3. The suit was brought in the federal district court in the district where the injury occurred and was bought under the subject matter jurisdiction of diversity of citizenship. 28 U.S.C. Section 1332.

Given such facts, this should be a simple case. The Court of Appeals appeared to acknowledge that the tort law claim asserted by plaintiff Scott was grounded in state law, albeit the state tort law of Indiana. (App. B, at B-3, modifying footnote 2 of the Court of Appeals opinion).

Under *Erie* v. *Tompkins*, 304 U.S. 64 (1938); *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); and *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3 (1975), the federal

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[6] In this case the tortfeasor dumped fecal material into the water and the fecal material traveled into the victim's state. For analytical purposes, the fecal material could just as easily been a rock, a bullet, or poisonous fumes. Similarly, the path by which the injurious material traveled could just as easily been the air, the groundwater or along an interstate highway. See discussion *infra*.

courts are constitutionally mandated under the Tenth Amendment to apply the choice of law rules of the forum state. Applying the *Erie* framework to this case, the Court of Appeals was required to apply the choice of law rules of Illinois, because Illinois was the forum state. Illinois choice of law rules would have applied Illinois substantive tort law. *People ex rel. Scott* v. *United States Steel Corp.*, 40 Ill. App. 3d 607, 352 N.E.2d 225 (1st Dist. 1976); *Metropolitan Sanitary District* v. *United States Steel Corp.*, 30 Ill. App. 3d 360, 332 N.E.2d 426 (1st Dist. 1975), *leave to appeal den.*, 60 Ill. 2d 597, *cert. denied*, 424 U.S. 976 (1976). Even if Indiana had been the forum state, Indiana choice of law rules dictated the application of Illinois law as the law of the place of injury. *Maroon* v. *State Department of Mental Health*, 411 N.E.2d 404 (Ind. App. 1980).

But what should be a simple *Erie* diversity case has been rendered unnecessarily and extraordinarily complex by the Court of Appeals decision to engraft a series of federal common law principles onto this case.

1. *The Court of Appeals adopted a federal common law choice of law rule dictating choice of law of the tortfeasor state.* Contrary to *Erie* and *Klaxon*, the Court of Appeals, in a diversity case based on state tort law, mandated a federal choice of law dramatically different than that of the forum state. The Court of Appeals mandated the application of Indiana law in complete disregard of the choice of law rules of the forum state—Illinois. To compound matters further, the Court of Appeals mandated a federal choice of Indiana substantive tort law even though Indiana choice of law rules would dictate application of Illinois substantive tort law. In this diversity case based on state tort law, the Court of Appeals chose to ignore both the law of Illinois and the law of Indiana and fashion a federal choice of law rule.

2. *The Court of Appeals disregarded the federal venue statutes governing this case.* The Court of Appeals fashioned a federal common law venue rule that places venue of a state tort diversity action solely in the state or federal courts of the

tortfeasor's state. Such judicially mandated venue flies in the face of the diversity venue statute—28 U.S.C. Section 1391(a)—which allows such an action to be brought in the district court where the plaintiff resides. Indeed, even if this case is characterized as falling under Section 1391(b), Congress has declared that venue can exist in the district where the claim arose, i.e., Illinois, *Cf. Milwaukee* v. *Illinois* ("*Milwaukee II*"), 451 U.S. 304 (1981) (App. G at G-16 n.5).

3. *The Court of Appeals rewrote the law of in personam jurisdiction, disregarding the mandate of Rule 4 of the Federal Rules of Civil Procedure and the forum state long arm statute it incorporates.* Despite clear constitutional authority that such *in personam* jurisdiction exists, the Court of Appeals appears to have held that Illinois courts or federal courts in Illinois acting in a diversity case do not have *in personam* jurisdiction over an out-of-state tortfeasor who shoots a bullet, or throws a rock or dumps sewage into Illinois causing injury in Illinois. This Court has recently confirmed that such *in personam* jurisdiction exists. *Calder* v. *Jones*, ____ U.S. ____, 104 S.Ct. 1482 (1984) ("The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects." 104 S.Ct. at 1485-86).

4. *The Court of Appeals fashioned a federal common law of torts.* Rather than examining the substantive tort law of either Illinois or Indiana as to whether plaintiff Scott stated a claim upon which relief can be granted, the Court of Appeals fashioned a federal common law tort rule based on an incorporation of the Restatement (Second) of Torts and held that Scott failed to state a claim because he failed to allege special damages. (App. A, at pp. A24-A25). The District Court had found that plaintiff Scott did state a claim upon which relief can be granted under Illinois law. App. F at F-12 n.5). In its 1970 Constitution, Illinois had eliminated the special damage requirement for tort recovery. (*Id.*).

Each of the federal common law principles crafted by the Court of Appeals (choice of law, venue, *in personam* jurisdiction and substantive tort law) is unprecedented and violates the constitutional framework established for diversity cases grounded in state law. The Court of Appeals entire analysis is based on its inconsistent and contradictory attempts to divine and reconcile the obscure meaning of footnote law in *Milwaukee I* and *Milwaukee II* with the clear and manifest intent of Congress to leave claims for tortious injury to state law.

That Congress wished issues of tort remedies for water pollution injuries to be addressed by state law, and not federal law, is clear. The Court of Appeals purported to honor Congress' intent by declaring that the state law of the tortfeasor's state would be the law applied to redress tortious injury from water pollution. At the same time, the Court of Appeals read the footnotes of *Milwaukee I* to declare a constitutional prohibition against the application of state law. Further, the Court of Appeals never examined the mandate of the Tenth Amendment and *Erie* as applied to the state law choice of law made by the Court of Appeals.

The Court of Appeals' declaration that the law of the tortfeasor's state governs tort remedies in a diversity case based on state tort law creates bizarre constitutional anomalies. To address these anomalies, this Court must clarify and reconcile: a) the relationship of the intent of Congress to preserve state tort law; b) the nature of the continuing preemptive role, if any, of *Milwaukee I* on state law; and, c) the role of the Tenth Amendment and *Erie* as applied to this diversity case. The Court should grant certiorari.

I.

THE TENTH AMENDMENT AND ERIE V. TOMPKINS PROHIBIT THE FASHIONING OF FEDERAL COMMON LAW CHOICE OF LAW IN A DIVERSITY ACTION BASED ON STATE LAW

The Court of Appeals fashioned a federal choice of law to mandate application of Indiana state tort law to this diversity

case without analyzing the requirements of the Tenth Amendment and *Erie*. If the Indiana state tort remedy which the Court of Appeals found to be preserved by Congress is grounded in state law, then *Erie* and its progeny prohibit the action of the Court of Appeals.[7]

To place the *Erie* analysis in constitutional perspective, it is necessary to review: a) the historical state choice of law rules followed for identifying the law to be applied to interstate torts; b) the declared intent of Congress to preserve state tort law; and, c) the Tenth Amendment mandate of *Erie* and its progeny.

A.

The Historical Framework Governing Determination of Tort Liability When the Tortious Conduct Occurs in One State and the Injury Occurs in Another State

To appreciate how the Constitution—particularly the Tenth Amendment—affects the choice of which law applies in this case, it is useful to explore the well-developed body of law followed for over one hundred years by the states, including Illinois and Indiana, regarding the law to be applied in interstate torts.

Two distinct principles arise from this body of law. First, under the Tenth Amendment, absent action by Congress to oust state tort law, it has been *state* tort law, not federal tort law, which determines whether there is tort liability. This principle has long been the rule regardless of whether the tortfeasor or tort victim are citizens of different states, regardless of whether the tortious conduct was initiated in one state and caused injury

[7] As discussed *infra*, there are other serious constitutional problems if the state law preserved by Congress in the passage of the 1972 amendments is not state law, but federal law selectively incorporating state law.

in another state, and regardless of whether it is the law of the tortfeasor's state or the law of the place of injury which has been applied.

Second, the vast majority of states have recognized in their choice of law rules the right of the state of injury to apply its law. See e.g., *Ruckman* v. *Green,* 16 N.Y.S.C. Rep. (9 Hun) 225 (1876):

> The cause of action arises upon the injury suffered by the complaining party, and so in respect to the lands situated in this state, the cause of action necessarily arose here, although the nuisance which produced the injury was situated in another State. There is no sound principle, we think, which precludes a party whose property is specially injured by a nuisance which casts upon it offensive and noxious vapors because of the interposition of a state line between the nuisance and the property so injured; . . .
> Id. at 229.

See also, Thayer v. *Brooks,* 17 Ohio 489, 49 Am. Dec. 474 (1848); *Cameron* v. *Vandegriff,* 53 Ark. 381, 13 S.W. 1092 (1890); Cf. *Simpson* v. *State,* 92 Ga. 41, 17 S.E. 984 (1893). This choice of law rule has been applied in Illinois, *People ex. rel. Scott* v. *United States Steel Corp.,* 40 Ill. App. 3d 607, 352 N.E.2d 225 (1st Dist. 1976); *Metropolitan Sanitary District* v. *United States Steel Corp.,* 30 Ill. App. 3d 360, 332 N.E.2d 426 (1st Dist. 1975) *leave to appeal den.,* 60 Ill.2d 597, *cert. denied,* 424 U.S. 976 (1976); and also in Indiana, *Maroon* v. *State Department of Mental Health,* 411 N.E.2d 404 (Ind. App. 1980).

These state choice of law principles allowing the state of the injury to apply its law were reflected in the first *Restatement of Conflicts of Laws,* (1934). Under the first Restatement[8], the

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[8] Contrary to their use by the Court of Appeals, the Restatements of the American Law Institute on various legal subjects do not constitute sources of law which may be applied by federal courts under the authority of the American Law Institute. The federal courts may only apply law for which the courts find its authority in the

Footnote continued on following page.

law of the state of the wrong—i.e., the place where the injury occurred—determined whether there was tort liability. Consider the following examples from the first Restatement:

> 1. A, standing in State X, fires a gun and lodges a bullet in the body of B who is standing in State Y. The place of the wrong is in Y.
>
> * * *
>
> 4. A, in State X, throws out noxious fumes from a chimney which destroys the grass of B in State Y. The place of the wrong is in Y.
>
> Restatement of Conflict of Laws, Section 377, Illustrations 1 and 4 (1934)[9]

The Restatement (Second) of Conflicts of Laws, while shifting toward the significant contacts analysis of Section 145 as the test to be applied in choosing the law to be applied, also recognizes that the law of the state of injury is normally the law that governs in determining tort liability where the tortfeasor is in another state. See generally, Restatement (Second) of Conflicts of Laws, Sections 146, 156-163.

Indeed, Indiana still follows the place of injury doctrine and would apply Illinois tort law to determine the liability of an Indiana tortfeasor for injury caused in Illinois. See *Maroon* v. *State Department of Mental Health,* 411 N.E.2d 404 (Ind. App. 1980).

Footnote continued from preceding page.

Constitution, Acts of Congress or the laws of the states. In meeting its constitutional duty to apply state law under the Tenth Amendment and *Erie* in diversity cases, the federal courts must look to the state choice of law of the forum state—not the general pronouncements of the Restatement.

[9] Contrary to the Court of Appeals' attempt to distinguish these cases, they not only involve property damage, but also involve personal injury. Compare the Restatement examples noted above with the Court of Appeals' statements that these cases were limited to property damage. App. A, at pp. A-17 to A-18, n.3.

There the Indiana courts applied Illinois substantive tort law directly against the State of Indiana where then tortious acts of state officials (release of a sexual psychopath) occurred in Indiana, but the injury (murder of an Illinois resident by the psychopath) occurred in Illinois.

Thus, at least a hundred years of well-established law governs the application of state law where the tortfeasor and his tortious conduct are in one state and the victim and the injury are in another.

B.

The Intent of Congress to Preserve State Law

There can be no question that Congress wanted to preserve state tort law and state choice of law rules governing state tort law with the passage of the Federal Water Pollution Control Act:

> It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with requirements under this Act would not be a defense to a common law action for damages.
>
> 2 Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93rd Cong. 1st Sess. 1499 (1973).

The House Committee on Public Works echoed similar sentiments:

> The Committee considers section 510 [33 U.S.C. Section 1370] to be of extreme importance in assuring the States of the right to adopt or enforce provisions at least as strict as those established in this legislation. Thus, *the Committee rejected in most instances suggestions for preemption by the*

Federal government and preempted the States only where the situation warranted it based upon the urgent need for uniformity such as in section 312(f) relating to marine sanitation devices.

1 Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93rd Cong. 1st Sess. 823 (1973).

Indeed, the legislative history of the predecessor of Section 510(2), Section 1(b) of the 1956 federal water pollution legislation—from which the current Section 510(2) was lifted *in haec verba*—demonstrates that Congress intended to preserve state tort law to cover just the kind of situation involved here. Consider the following colloquy between Senator Robert Kerr, Assistant Secretary of the Department of Health Education and Welfare, Roswell Perkins and Sidney Saperstein of the Office of General Counsel of HEW:

Senator KERR. What would be the effect of this law [the federal law] against the United States Steel Co.—let's say against Monsanto Chemical Co., at St. Louis—from whose plant obnoxious sewage and materials were permitted to get into the Mississippi River, and somebody with a farm at Cairo, Illinois would have some overflow and his land would be ruined by chemical substances in that overflow which he identified as either being Monsanto Chemical Co. products or similar in character to it. Would he then, under the provisions of this act, have a basis for suit for damages against the chemical company in St. Louis?

Mr. PERKINS. There would be no change—

Senator KERR. I did not ask that.

Mr. SAPERSTEIN. Senator, just as under existing law, this act does not give the private party a basis for another cause of action against another private party. This law merely authorizes the Federal Government to step in when the interests—health or welfare—of the citizens of one state are adversely affected by the pollution originative of another state.

It does not give those private parties which are adversely affected the right to come into court and sue. They would have to do that under the *common law or statutes now in existence.*

> Senator KERR. They have that right under the law now?
>
> Mr. SAPERSTEIN. Yes sir.
>
> Proposed Amendments to the Water Pollution Control Act: Hearings on S.890 and S.928 Before a Subcomm. of the Senate Comm. on Public Works, 85th Cong., 1st Sess. 48 (April 22, 1955). (emphasis added)

This colloquy, when considered in conjunction with the clear statements in the legislative history of the 1972 amendments, is strong evidence that Congress wished to have the issue of tort liability addressed under state law.[10]

There is absolutely no evidence that Congress wished to destroy either state tort law or the state choice of law rules which had regulated which state's tort law should be applied. Nor is there any evidence that Congress wished to override the Tenth Amendment mandate of *Erie,* that in matters relegated to state law, neither Congress nor the federal courts had any business adopting federal rules to govern state law actions. In other words, Congress may oust state law remedies, but once Congress has chosen to preserve such state law remedies, Congress cannot constitutionally dictate the content of those state remedies. See discussion of *Erie, below.*

C.

The Tenth Amendment Mandate of *Erie*

In *Erie* and its progeny, this Court has repeatedly held that where, as here the tort law under which relief is sought is grounded in state law; and where, as here, the basis of federal subject matter jurisdiction is diversity of citizenship, the federal

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[10] Indeed the legislative history demonstrating intent to preserve state tort remedies here under the FWPCA is clearer and broader than that found by this Court to preserve state tort remedies in *Silkwood* v. *Kerr-McGee Corp.*, ____ U.S. ____, 104 S.Ct. 615 (1984).

courts are constitutionally precluded from ignoring state law—including state choice of law rules—and from applying *ad hoc* federal common law rules as to substantive law and choice of law.

> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.
>
> *Erie* v. *Tompkins,* 304 U.S. at 78.

The Tenth Amendment prohibition announced in *Erie* against federal courts fashioning substantive federal law in enforcing claims based on state law was applied to choice of law questions as well as in *Klaxon:*

> It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws . . . the proper function of the . . . federal court is to ascertain what the state law is not what it ought to be.
>
> 313 U.S. at 496-497.

Indeed where as here the state tort remedy which the Court of Appeals acknowledged to be available to plaintiff is grounded in state law, *Erie* indicated that even Congress would be prohibited by the Tenth Amendment from dictating the content of state tort law and choice of law rules. *Erie,* 304 U.S. at 78. Clearly the choice of law rules of the forum state should be applied in this case.[11]

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[11] Even assuming *arguendo* that the Seventh Circuit correctly concluded that Indiana law governs this case and not Illinois law, the Court of Appeal's judgment was wrong. Rather than reverse with instructions to dismiss and deprive Petitioner Scott of any remedy, the Court should have remanded with instructions to apply Indiana law to the factual allegations of Scott's complaint. See, e.g., *Krauss* v. *Manhattan Life Insurance Company of New York,* 643 F.2d 98 (2d Cir. 1981); *Boatland, Inc.* v. *Brunswick Corp.,* 558 F.2d 818 (6th Cir. 1977); *Liew* v. *Official Receiver and Liquidator (Hong Kong),* 685 F.2d 1192 (9th Cir. 1982); *Lettieri* v. *Equitable Life Assur. Soc. of the United States,* 627 F.2d 930 (9th Cir. 1980); *Melville* v. *American Home Assur. Co.,* 584 F.2d 1306 (3rd Cir. 1978).

II.

THE COURT OF APPEALS DECISION RAISES CONSTITUTIONAL ANOMALIES WHICH IF ALLOWED TO STAND WILL VIOLATE ERIE, THE EXPRESS INTENT OF CONGRESS TO PRESERVE STATE LAW, AND THIS COURT'S HOLDING IN MILWAUKEE II

The Court of Appeals' decision to fashion a federal choice of law mandating application of the tortfeasor's state law stems from its tortured attempts to divine and reconcile the footnote law of *Milwaukee I* and *Milwaukee II* with the clear intent of the Congress to preserve state law and the constitutional mandates of *Erie* (the Tenth Amendment). But the analysis of the Court of Appeals creates such constitutional anomalies that it cannot withstand rational analysis. If allowed to stand, the decision below will violate *Erie;* and the only constitutional theory on which it can stand also violates the express allocation of power between the federal and state governments by Congress in the 1972 amendments and violates the holding of *Milwaukee II* that federal common law in this area no longer exists.

A.

The Conflict Between the Court of Appeals' Milwaukee I Analysis and Congressional Intent to Preserve State Law

Consider the following logical dilemmas created by the Court of Appeal's decision:

1. *Indiana law cannot apply under the Court of Appeals' Milwaukee I analysis.* If footnote 6 of *Milwaukee I* (App. S at S-13) is really a declaration that the Constitution bars the application of state law to a diversity action between citizens of two states seeking redress for tortious injury,[12] then the Court of

[12] Contrary to the Court of Appeals' perception of *Milwaukee I,* there is nothing in the Constitution that prohibits the application of

Footnote continued on following page.

Appeals erred in applying Indiana tort law to this controversy. If the Constitution bars state law, it bars Indiana law as well as Illinois law.

2. *The Court of Appeals' Milwaukee I analysis overrides Congressional power to declare that state law shall govern.* If footnote 6 of *Milwaukee I* (App. S at S-13) is a declaration that the Constitution prohibits the application of state law, then Congress has no power to declare that state law shall govern tortious injury. If footnote 6 is held to have such permanent preemptive effect, this Court's *Milwaukee I* decision will destroy the allocation of federal and state power made by Congress in the 1972 legislation.

3. *The Court of Appeals' Milwaukee I analysis unconstitutionally discriminates against Illinois citizens.* If footnote 6 of *Milwaukee I* (App. S at S-13) is a declaration that plaintiff Scott, an Illinois citizen, is barred from seeking relief under Indiana state tort law in Indiana courts for a tortious injury when an Indiana citizen can seek relief under Indiana tort law for the same tortious conduct, then there is a conflict between footnote 6 and the Privileges and Immunities Clause,[13] as well as the equal protection guarantees embodied in the Fifth and Fourteenth Amendments. Cf. *Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

4. *The Court of Appeals' analysis creates federal common law and violates Milwaukee II.* If the Court of Appeals is

---

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state law in a dispute between citizens of different states. Indeed, as discussed *supra,* the Tenth Amendment as construed in *Erie* dictates the application of state law. Moreover, over one hundred years of state choice of law decisions have held that the transmission of injurious material across state lines—be it fumes or fecal matter, rocks or bullets—raises questions of state law addressed by state choice of law doctrines.

[13] "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." U.S. Constitution, art. IV, sec. 2, cl. 1.

correct and footnote 6 of *Milwaukee I* (App. S at S-13) is declarative of a permanent constitutional preemption of state law which neither the courts nor the Congress can override, then this Court has unwittingly ushered in an era of federal "interstitial" common law of enormous breadth and uncertainty. Since under footnote 6 of *Milwaukee I* the Constitution bars state law, the state law of the tortfeasor must necessarily be grounded in federal law, i.e., the Clean Water Act. Indeed the only way the Court of Appeals' construction of *Milwaukee I* and its choice of Indiana substantive law can be reconciled with *Erie* is to hold that the "state" law preserved by Congress to address tortious injury is really federal law selectively incorporating the law of the tortfeasor's state. Compare *Erie* and its progeny with *Del Costello* v. *IBT*, ____ U.S. ____, 103 S.Ct. 2281, 2287, n.13 (1983); *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 1979); *Rodrigue* v. *Aetna Casualty and Surety Company*, 395 U.S. 352 (1969); *International Union, U.A.A. & A.I.W.* v. *Hoosier Cardinal Corporation*, 383 U.S. 696 (1966). Thus, in this case, the "Indiana" "state" tort law which the Court of Appeals found to be applicable would in reality be federal law which selectively incorporates the tort law of the tortfeasor state.

B.

The Conflict Between the Court of Appeals' Analysis and Milwaukee II

Such a construction—that the state tort law preserved by Congress is really federal interstitial common law of torts, with selected incorporation of state law—though superficially addressing some of the constitutional conundrums created by the Court of Appeals, creates even more constitutional problems:

1. *Congress clearly did not intend federal law to govern tort remedies.* A declaration that the "state" tort law preserved by Congress is really interstitial federal common law selectively

incorporating state tort law principles is clearly contrary to the intent of Congress' allocation of federal and state power. When Congress went out of its way to preserve other statutory and common law remedies under state law, Congress certainly did not contemplate "federal" tort law selectively incorporating state law.

2. *Milwaukee II held that there was no federal common law in this area.* A declaration that the "state" tort law preserved by Congress is really interstitial federal common law selectively incorporating state tort law principles is inconsistent with this Court's holding in *Milwaukee II* that all federal common law of tort liability had been ousted by the statutory framework adopted by the Congress in 1972—which allocated tort remedies to state law.

3. *The recognition of interstitial federal tort law would create tremendous lawmaking burdens on the federal courts.* Any such congressionally created federal law of tort liability selectively incorporating state law would ultimately be governed by federal, not state law principles. Thus, questions of statutes of limitation, contribution, indemnity, third party liability, joint and several liability and choice of law would all have to be resolved by federal courts fashioning what is essentially interstitial federal common law to flesh out Congressional intent. While state law would be available, the federal courts would be burdened with the task of shaping selective state doctrines to fit federal goals. (See, e.g. *Del Costello* v. *IBT*, ____ U.S. ____, 103 S.Ct. 2281 (1983), and other cases cited at p. 22 *supra*).

4. *Federal interstitial tort law would confer federal question subject matter jurisdiction in the federal courts.* Such a theory would create new subject matter jurisdiction for the federal courts. If state tort law really has its basis in the federal statute, then there is no reason why a citizen of Illinois cannot sue another Illinois citizen in federal court under federal question jurisdiction for the federal/state tort of polluting Lake Michi-

gan and seek damages and injunctive relief in federal court. Similarly, there is no reason under such a theory why an Indiana resident could not sue Hammond under this federal/state common law tort in federal court for damages and injunctive relief under Section 1331 jurisdiction. Surely, if the state law claim really has its source of power in the act of Congress rather than in the power of the State of Indiana, the case arises under the laws of the United States, and thus within the federal question jurisdiction of the federal courts.

5. *Such federalized "state" tort law would conflict with true state tort law.* Any such congressionally created federal law of tort liability selectively incorporating state law would create major potential for conflict with parallel state law remedies. For example, what would be the law applied under the Court of Appeal's theory in two parallel suits under Indiana law—one brought by an injured Indiana plaintiff and the other by the injured Illinois plaintiff? Under the Indiana plaintiff's suit, presumedly Indiana's actual state law would apply while under the Illinois plaintiff's suit, the court would apply the federal statutory interstitial tort law selectively applying state law.

Potential conflicts would arise when federal courts developed interstitial federal common law doctrines of statutes of limitations, comparative negligence, strict liability, third party liability, assumption of risk, contributory negligence, special damage standing, and similar issues which are attendant to all tort litigation.

6. *The Court of Appeals created a federal common law of venue and in personam jurisdiction.* Even if the Congress has authorized the federalized state law of the tortfeasor—and thus a federal question cause of action under Section 1331, the question remains whether the Court of Appeals can disregard the venue statute passed by Congress governing actions not based on diversity and the Federal Rules of Civil Procedure governing the exercise of in personam jurisdiction. As noted

above, venue is proper in the Northern District of Illinois, and that court has *in personam* jurisdiction over Defendants in this case.

C.

Adoption of a Federal Interstitial Common Law of Tort Law Selectively Incorporating State Tort Law Principles in This Case Will Apply with Equal Force to Similar Statutory Schemes

The precedent set by the Court of Appeals' decision will have far ranging and negative implications. In numerous statutes, Congress has affirmatively preserved state statutory and common law tort remedies on the understanding that the state tort law remedies preserved would be grounded in state law and not some federalized interstitial tort law based upon the regulatory statute. Thus Congress has preserved state law tort remedies for manufacture and distribution of hazardous or injurious products even though those same products may be regulated by a federal consumer product safety standard under a comprehensive program for regulating product safety.[14] In air pollution, the federal government has engaged in a comprehensive program to regulate air, 42 U.S.C. Section 7401 *et seq.*, but has explicitly preserved state tort remedies for air pollution.[15] In addressing toxic wastes, Congress has adopted a comprehensive "cradle to grave" regulatory program under the Resource Conservation and Recovery Act, 42 U.S.C. Sections 6901, *et seq.*, but has taken pains to preserve common law and statutory remedies under state tort law.[16] In each of these

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[14] Consumer Product Safety Act, 15 U.S.C. Section 2051, *et seq.* The provision preserving state tort remedies is 15 U.S.C. Section 2074.

[15] 42 U.S.C. Sections 7416 and 7604(e). In air pollution, this Court declared a federal common law remedy on the same day as *Milwaukee I. Washington* v. *General Motors Corporation,* 406 U.S. 109 (1972).

[16] 42 U.S.C. Sections 6929 and 6972(f). Indeed, under RCRA, generators in one state often transport hazardous or toxic wastes by

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instances, tortious conduct may originate in the state of the tortfeasor and produce injury in the state of the victim.[17]

If the Court of Appeals' adoption of federalized common law principles of choice of law and venue are permitted in this case, there is no logical reason why a similar "interstitial" federal common law requirement cannot be imposed in other cases where Congress has sought to preserve state tort law in the face of a concurrent federal regulatory program.

III.

RECONCILING MILWAUKEE I, MILWAUKEE II, THE CLEAN WATER ACT, AND ERIE

As described above, the problem faced by the Court of Appeals was reconciling the footnote law of *Milwaukee I* and *Milwaukee II* with the clear intent of the Congress to preserve state law and the constitutional mandates of *Erie* (the Tenth Amendment). This Court could reconcile footnote 6 of *Mil-*

Footnote continued from preceding page.

truck or rail under federal license to treatment, storage, and disposal sites in other states. Under the theory espoused by the Court of Appeals in its federalized law of the tortfeasor state approach (with common law venue only in the tortfeasor's state), a citizen damaged by contaminated groundwater in the state where the waste was disposed of could not sue the generator of that waste under the law of the victim's state, nor could the victim even sue the generator in the place of the injury. Similar arguments would be raised where the contamination of a groundwater aquifer moved from the disposal area in one state into the groundwater of another state. Moreover, many of the interstate generators and shippers of toxic materials are municipalities, and many municipalities are also owners and operators of disposal sites.

[17] For example, a large number of product liability cases involving failure of a component necessarily include out of state manufacturers or component assemblers.

waukee I with congressional preservation of state law by simply overruling any arguable application of *Milwaukee I* to a diversity case based on state tort law.[18]

Alternatively, this Court could construe the holding in *Milwaukee I* to have preempted state law only while federal common law was in existence. Once Congress preempted federal common law, the ban on state law was gone and Congress was free to arrange the federal state relationship as it saw fit. Congress' action in recognizing the role of state law in effect restored the temporarily suspended state law. See *Butner* v. *United States,* 440 U.S. 48 n.9 (1979).

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[18] If one listened to the hyperbole of the Hammond defendants, *Milwaukee I* prohibits application of the victim's state law against a state or a political subdivision on the theory that state militia will march if the victim's state law is applied against a sovereign state or its political subdivision. But the law is clear that even sovereign states may be subject to application of the victim's state law. See e.g., *Nevada* v. *Hall,* 440 U.S. 410 (1979); *Maroon* v. *State Dept. of Mental Health,* 411 N.E.2d 404 (Ind. App. 1980).

CONCLUSION

It is imperative that this Court declare that the state tort law preserved by the Congress is grounded in state not federal law and that in a diversity case founded on such state tort law the federal Courts are bound by the constitutional doctrine announced in *Erie* v. *Tompkins* and set forth in the Rules of Decision Act that they must follow the choice of law rules of the state in which the district court sits.

This Court should grant the petition for certiorari.

Respectfully submitted,

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Nos. 84-21
84-38

In the

Supreme Court of the United States

OCTOBER TERM 1984

PEOPLE OF THE STATE OF ILLINOIS and
PEOPLE OF THE STATE OF MICHIGAN,
Petitioners,

v.

CITY OF MILWAUKEE, et al.,
Respondents.

PEOPLE OF THE STATE OF ILLINOIS and the
METROPOLITAN SANITARY DISTRICT OF
GREATER CHICAGO,
Petitioners,

v.

THE SANITARY DISTRICT OF HAMMOND, et al.,
Respondents.

WILLIAM J. SCOTT,
Petitioner,

v.

CITY OF HAMMOND, INDIANA, et al.,
Respondents.

HAMMOND RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly apply the limitations on state power recognized by this Court in *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972) (*"Milwaukee I"*), in its decision that Illinois law and courts could not govern discharges to Lake Michigan by a municipality located in Indiana?

2. Did the Court of Appeals correctly determine that interstate water pollution disputes involve the same considerations of federalism as disputes over the allocation of water in interstate rivers and lakes?

3. Did the Court of Appeals correctly determine that the limitations on state power recognized in *Milwaukee I* remain unaffected by the passage of the 1972 amendments to the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §1251 *et seq.,* and this Court's decision in *City of Milwaukee* v. *Illinois,* 451 U.S. 304 (1981) (*"Milwaukee II"*)?

4. Did the Court of Appeals' decision that Illinois could not govern discharges made in Indiana constitute the application of principles of federalism derived from the Constitution rather than, as petitioners claim, the creation of a separate body of federal choice-of-law rules?

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HAMMOND RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

This brief is filed in opposition to the petitions for writs of certiorari filed by the State of Illinois and the Metropolitan Sanitary District of Greater Chicago in No. 84-38 and William J. Scott in No. 84-21. The opinion of the Court of Appeals reversing the decision of the District Court is reported in the advance sheets at 731 F.2d 403 (7th Cir. 1984), and is set forth in the separately bound Appendices filed with the petitions at A-1. The Court's subsequent order of May 29, 1984, which denied the petitions for rehearing and modified the March 27, 1984 opinion, is unreported and is set forth in the Appendices at B-1. The District Court's opinion is reported at 519 F. Supp. 293 (N.D. Ill. 1981), and is set forth in the Appendices at F-1.

THE NATURE OF THE CASES

In September, 1980 Illinois and the Metropolitan Sanitary District of Greater Chicago filed a five count complaint in the Circuit Court of Cook County, Illinois, against Hammond, Indiana, the Hammond Sanitary District and the District's trustees and manager ("Hammond") in which they alleged that discharges by Hammond of inadequately treated sewage and grease to Lake Michigan which floated to the part of Lake Michigan adjoining Illinois were in violation of the Illinois Environmental Protection Act (Counts I and II), the federal common law of nuisance (Count III), Illinois common law and statutory law of nuisance (Count IV) and the Illinois common law of trespass (Count V). The complaint requested that the court order Hammond: (1) to stop making the discharges, (2) to prevent any illegal or unauthorized interconnections with its sewer systems, (3) to deny any new or additional hook-ups to its system, (4) to remove and dispose of

all complained of materials in Lake Michigan and on the beaches of Lake Michigan in a manner approved in advance by the Illinois Attorney General, the Illinois Environmental Protection Agency, and the United States Environmental Protection Agency within the shortest possible time, (5) to construct and install permanent facilities that would prevent further discharges to Lake Michigan of the type complained of, (6) to pay damages to be placed in a trust fund to reimburse any entity which had or would incur costs to clean the waters of Lake Michigan, (7) to pay a civil penalty of $10,000 for each violation of the Illinois Environmental Protection Act and an additional penalty of $1,000 per day for each day that the violations continued, and (8) to provide such other relief as shall be just.

The Illinois case was removed to the District Court for the Northern District of Illinois by Hammond on the ground that the federal common law of nuisance claim created federal question jurisdiction. The District Court thereafter denied the motion of Illinois to remand the case to state court. *Illinois* v. *Sanitary District of Hammond,* 498 F. Supp. 166 (N.D. Ill. 1980).

William J. Scott filed a class action in the District Court on behalf of citizens of Illinois who used Lake Michigan. He alleged that Hammond's discharges constituted "both a public and private nuisance under Illinois law and independently both a public and private nuisance under federal common law." Scott invoked federal jurisdiction on the basis of diversity of citizenship and the existence of a federal question under the federal common law of nuisance claim. Scott requested

money damages of $1,000,000 "for benefit of the plaintiff class" and an injunction requiring Hammond to cease the challenged discharges.

Hammond moved for dismissal of the petitioners' complaints for failure to state claims. The District Court granted the motion on the federal common law of nuisance claims, but denied it on the state law claims. *Scott* v. *City of Hammond*, 519 F. Supp. 293 (N.D. Ill. 1981), App. at F-1. The District Court certified its ruling for interlocutory appeal under 28 U.S.C. §1292 (b). Hammond was granted permission to appeal by the Court of Appeals and its appeal was consolidated with the consideration of the remand in *Milwaukee II*. App. at E-2.

The Court of Appeals reversed the District Court's decision on the applicability of Illinois law and directed that the cases be dismissed. It observed:

> "In the present cases the political subdivisions of one state claim a right to an extent of use of interstate water in the exercise of their public health functions. A different state complains that a use to that extent causes contamination of its waters and is inimical to public health because those waters are used for water supplies and recreation. This is a controversy of federal dimensions, implicating the conflicting rights of states and inappropriate for state law resolution. The latter state does not seek mere enforcement of effluent limitations established under federal law, but imposition of more stringent limitations.
>
> "The very reasons the Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why the state claiming injury cannot apply its own state law to out-of-state discharges now." (731 F.2d at 410, App. at A-16)

The Court of Appeals also concluded that in addition to the remedies available to petitioners under the FWPCA, the petitioners could bring an action under Indiana law in a federal or state court in Indiana because the FWPCA preserved state jurisdiction over discharges made within them. 731 F.2d at 410 n. 2, 414; App. at A-16 n. 2, A-23.

Petitioners filed a request for rehearing in which they requested the Court of Appeals to modify its decision to allow them to amend their complaints in the District Court to assert their claims under Indiana law. The Court of Appeals denied this request. App. at B-3.

REASONS FOR DENYING THE WRITS

I

INTRODUCTION

Twelve years ago petitioners Illinois and Scott, its then Attorney General, argued persuasively that the law of one State could not control interstate water pollution disputes. *See* Plaintiff's Brief Regarding the Applicable Law filed by Illinois in *Milwaukee I*. This Court in *Milwaukee I* unanimously held that the nature of such disputes required the recognition of a federal common law of nuisance. *Milwaukee I* recognized that interstate water pollution disputes involve the same considerations of federalism and the sovereign rights of States as interstate water allocation disputes. A State has the power to choose what uses it will permit of the waters within it, but it does not have the power to impose its choices on another State. Although the members of this Court disagreed in *Milwaukee II* over the effect of the 1972 FWPCA amendments, there was no disagreement that under our federal system the law of one State could not govern the discharges to an interstate lake or river made in another State. *Compare Milwaukee II*, 451 U.S. at 314 n. 7, App. at G-7 n. 7; 451 U.S. at 315 n. 8, App. at G-9 n. 8; with 451 U.S. at 335, App. at G-28 - G-29 (Blackmun, dissenting).

The Court of Appeals correctly applied these principles in these cases. It recognized that no State or the courts created by it had the power to impose policy decisions over the use of resources in another State. To permit this to be done would infringe upon the equal power of the other State to make its own policy decisions. Any

disputes arising from conflicting resource uses permitted by different States can only be resolved through federal law. *Milwaukee I*, 406 U.S. at 105 & n. 6, App. at S-13 & n. 6; *Hinderlider* v. *LaPlata River & Cherry Cr. D. Co.*, 304 U.S. 92, 110 (1938). Since 1972 that federal law has been the FWPCA.

The Court of Appeals also correctly recognized that nothing in *Milwaukee I* or the FWPCA prevented someone from asking the courts of a State in which discharges were being made to apply its law to those discharges. This state remedy was specifically preserved in FWPCA section 510 (33 U.S.C. §1370).

Petitioners now contend, contrary to the belief of the entire Court in *Milwaukee II*, that state law can operate far more broadly. They argue that when the federal common law of nuisance was replaced by the FWPCA, an extraterritorial state police power that could not coexist with the federal common law of nuisance was revived as an alternative to federal statutory law. They do not explain how this extraterritorial state power that was suppressed by the federal common law of nuisance can flourish under the FWPCA; it is simply presented as a fact. Rather than accept the Court of Appeals' statement that the "very reasons" that were given for this Court's resort to federal common law in *Milwaukee I* required the decision it reached, petitioners characterize the Court of Appeals' decision as the creation of a federal common law choice-of-law rule for interstate tort disputes. They argue that its implementation would have a profound effect on the remedies available for all torts with interstate aspects and that it conflicts with *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and *Klaxon* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

These cases are not, as petitioners portray them, comparable to simple transboundary tort cases. The conclusions of the Court of Appeals were based on the subject matter of the dispute, the use of water resources within a State, and the significant State interest in that subject matter, especially with respect to its own political subdivisions. Thus, the issue decided by the Court of Appeals was not one of choice-of-law, but the fundamental question of whether a State has the power to impose through its law or courts regulations and financial burdens on the taxpayers of a sister State that infringe upon the sister State's sovereignty. The Court of Appeals recognized the real nature of these cases and correctly followed this Court's decisions on the nature of the relationship of the States.

The Court of Appeals did not hold that there are no remedies for interstate pollution of Lake Michigan. There are the remedies provided by the FWPCA, which were invoked by the United States Environmental Protection Agency and the State of Indiana. Also, more stringent relief can be sought under Indiana law in Indiana courts. Petitioners are not seeking a remedy but the assertion of extraterritorial power either through Illinois statutes or "vague and indeterminate nuisance concepts and maxims of equity jurisprudence." The basis on which review is actually being sought is petitioners' adamant refusal to accept the inherent limitation on state power under our federal system which has been repeatedly confirmed by this Court. Review of the Court of Appeals' decision, therefore, is not warranted.

II

UNDER OUR FEDERAL SYSTEM STATES AND THEIR COURTS CANNOT HAVE EXTRATERRITORIAL POWER OVER THE USE OF INTERSTATE WATERS

The use made of the air, a river or a lake in one State cannot be controlled by any other State. *Milwaukee I*, 406 U.S. at 105 n. 6 (1972), App. at S-13 n. 6; *Hinderlider* v. *LaPlata & Cherry Cr. D. Co.*, 304 U.S. 92, 110 (1938); *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907. This Court in *Milwaukee I* created a federal common law of nuisance to govern interstate water pollution disputes because state law could not be applied. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 n. 13 (1981). As the Court succinctly observed in *Milwaukee II*: "If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used." 451 U.S. at 314 n. 7, App. at G-7 n. 7. There was no dispute on this point in *Milwaukee II*. 451 U.S. at 335, App. at G-28 - G-29 (Blackmun, dissenting). Extraterritorial state power over the use of the environment cannot exist because of the coequal sovereign status of the States.

Just as it is accepted that Canada's Parliament and Canadian courts do not have the power to regulate the emmissions of industries in the United States because of their effect on Canada's environment, it must also be accepted that Illinois law and Illinois courts cannot have the power that petitioners claim for them. The relationship between States in environmental matters is comparable to that between countries, except that the Constitution authorizes a federal resolution of interstate disputes.

Each State is sovereign within its territory, except to the extent provided by the Constitution and laws enacted in accordance with it. U.S. Const. amend. X; *Parker* v. *Brown,* 317 U.S. 341, 359-360 (1943); *Kansas* v. *Colorado,* 206 U.S. 46, 95 (1907). The sovereignty of each State necessarily implies a barrier against intrusion by the laws and courts of sister States into matters that involve the attributes of sovereignty. *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286, 291-294 (1979). Each State has the sovereign power to regulate the use of the resources located within it, but no State has the power to interfere with a sister State's equal power. *Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, 237-238 (1907).

What a State permits to be put into the air and waters in its territory involves policy decisions that arise from the exercise of its fundamental powers as a State and frequently, as in this case, a State's ability to manage traditional governmental operations. The best proof of this is the nature of relief sought in this litigation by Illinois; relief that Illinois and its courts might appropriately impose on an Illinois municipality but cannot impose on an Indiana municipality. For instance, Illinois sought an order that would have blocked economic development in a part of Indiana by barring any new factory, business or home from having access to the only sanitary and stormwater sewer systems in an area of Hammond. Illinois also requested relief that would have involved an Illinois court in directing and controlling the construction of an Indiana municipal sewer facility, who would do it, on what schedule and how it would be paid for by Indiana taxpayers. Such matters are usually the subject of a State's own laws. *See, e.g.,* Ind. Code §36-9-25-1, *et seq.*

Petitioners have cited decisions of this Court such as *Allstate Insurance Co.* v. *Hague,* 449 U.S. 302 (1981), *Nevada* v. *Hall,* 440 U.S. 410 (1979), and *Bradford Electric Co.* v. *Clapper,* 286 U.S. 145 (1932), for their argument that the interstate aspects of petitioners' claims raise no barrier to the application of Illinois law. None of those decisions involved an effort by one State to intrude on the sovereignty of sister States by governing what could be done within their borders. Thus, in *Nevada* v. *Hall* it was noted that a decision involving a traffic accident that occurred outside of Nevada "could hardly interfere with Nevada's capacity to fulfill its own sovereign responsibilities." 440 U.S. at 424 n. 24. *See also Allstate Insurance Co.* v. *Hague,* 449 U.S. 302, 324 (1981) (Stevens, concurring).

Petitioners argue that even if Indiana law is the only state law that can govern discharges to Lake Michigan made in Indiana, the Court of Appeals should have remanded these cases to the District Court in Illinois so that petitioners could seek their relief under Indiana law. The Court of Appeals' remand for dismissal was correct, however, because the District Court could not have had jurisdiction under the proposed amended claims.

The dismissal of the federal common law of nuisance claim in the Scott case left diversity as the only basis for federal jurisdiction. Since the District Court under diversity jurisdiction is, in effect, another court of the State of Illinois, it could have retained the case with the proposed amendment only if Illinois courts have the power to grant the relief sought by Scott under the guise of applying Indiana law. *Woods* v. *Interstate Realty Co.,* 337 U.S. 535, 537-538 (1949); *Angel* v. *Bullington,* 330 U.S. 183, 186-187, 192 (1947). It is inconceivable that Illinois

courts by merely saying that they are applying Indiana law could require parties in Indiana to adhere to stricter standards than those established by Indiana pursuant to the FWPCA and to pay for costly facilities not required by Indiana under the FWPCA. The creation of such obligations by Illinois courts through what this Court described in *Milwaukee II* as "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence" would be an intolerable invasion of Indiana's sovereignty.

The jurisdiction of state courts is restricted by the territorial limitations on the power of the respective States. *Hanson* v. *Denckla,* 357 U.S. 235, 251 (1958); *Pennoyer* v. *Neff,* 95 U.S. 714, 720 (1877); *Suffolk* v. *Chapman,* 31 Ill. 2d 551, 555, 202 N.E.2d 535, 537 (1964); *Solliday* v. *The District Court in and for the City and County of Denver,* 135 Colo. 489, 497-98, 313 P.2d 1000, 1004 (1957). Since an Illinois court purporting to apply Indiana law to Hammond would still be only a creation of Illinois, there is no basis on which it can exceed the power possessed by Illinois and infringe upon the sovereignty of Indiana. The Court recognized this principle in the foreign relations context in *Steele* v. *Bulova Watch Co.,* 344 U.S. 280, 285 (1952), in which it was held that a federal court could govern the conduct of United States citizens in foreign countries "when the rights of other nations or their nationals are not infringed" because of the duty owed by citizens to their own government.

To transform an Illinois court claiming to adopt Indiana law into an Indiana court would create a fiction in a field in which Mr. Justice Holmes cautioned: "And in States bound together by a Constitution and subject to

the Fourteenth Amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald* v. *Mabee,* 243 U.S. 90, 91 (1917).

The District Court should not have exercised jurisdiction over any claims asserted under Indiana law by Illinois upon remand. The Illinois case was initiated in an Illinois court and removed solely on the ground that it asserted a claim under the federal common law of nuisance. *Illinois* v. *Sanitary District of Hammond,* 498 F. Supp. 166 (N.D. Ill. 1980).[1] The Illinois state law claims fell under the pendent jurisdiction of the District Court. Discovery in the Illinois and Scott cases has been insignificant. If the Illinois case were remanded and Illinois filed a claim under Indiana law, the District Court would be presented with claims based solely upon state law in a case that was procedurally in its infancy. Federal jurisdiction should not be exercised under such circumstances. *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966); 3A Moore, *Federal Practice* ¶18.07 [1.-3], 18-59 (2nd ed. 1984).

III

THE FWPCA DOES NOT AUTHORIZE THE USE OF STATE LAW TO GOVERN OUT-OF-STATE DISCHARGES

The Court of Appeals followed the language and legislative history of sections 505(e) and 510 of the FWPCA (33 U.S.C. §§1365(e), 1370) in rejecting petitioners' argument that the sections authorized the extraterritorial application of state law. It found that both sections were saving provisions that preserved the traditional power

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[1] Diversity jurisdiction did not exist over the Illinois case. *Milwaukee I,* 406 U.S. at 97 n. 1, App. at S-6 n. 1.

of the States over the use of water resources within them but did not create any new state power.

Section 505(e)[2] states only that nothing in the provisions of §505 affects any other remedies which persons *may* have under other laws. It is a standard saving provision and means only that the provisions for citizen suits in §505 do not preclude the use of other existing remedies. It does not create remedies itself. *Milwaukee II*, 451 U.S. at 328-329, App. at G-22. Section 510[3] is similar in

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[2] Section 505 provides for citizen suits under certain conditions. Section 505(e) provides:

> "*Nothing in this section* shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." (Emphasis added.)

[3] Section 510 provides:

> "Except as expressly provided in this chapter, *nothing in this chapter* shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." (Emphasis added.)

that it provides that *nothing* in chapter 26 of the FWPCA is to preclude or deny the right of any State to adopt requirements more stringent than those created under the FWPCA. It does not purport to create any new State powers, especially extraterritorial powers. The only purpose of §510 was to preserve whatever rights, if any, the States had prior to the 1972 FWPCA amendments. Nothing in the legislative history of §510 indicates any intent other than to prevent the FWPCA being interpreted as a preemption of the existing rights of the States, except as expressly provided. Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of* 1972, 93rd Cong., 1st Sess., vol. 1, 823, vol. 2, 1503 (1973).

IV

ERIE IS NOT APPLICABLE

The Court of Appeals' decision does not contravene *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1958). Since the nature of our federal system requires that the only substantive state law that can be applied to discharges in Indiana is Indiana law, *Erie* is not applicable. If *Erie* were applicable, then *Hinderlider* v. *LaPlata River & Cherry Cr. D. Co.*, 304 U.S. 92 (1938), decided the same day as *Erie*, was wrongly decided. *Erie* did not upset the overriding federal interest in precluding the extraterritorial imposition of the law of one State upon the sovereign rights and interests of another. *Milwaukee* II, 451 U.S. at 334-335; App. at G-28 - G-29 (Blackmun, dissenting). The application of limitations on state power required by our federal system does not constitute the creation of a federal choice-of-law rule any more than the application of constitutional provisions to state actions or laws is a choice-of-law decision.

The fact that Indiana follows the *lex loci delicto* rule in ordinary tort cases that do not involve its sovereign rights cannot be translated into a determination that it would surrender its sovereignty to Illinois. The choice of law involved in ordinary tort cases is a determination of which law of two or more *possible* laws governs a certain situation. 1 Beale, *Treatise on the Conflict of Laws* 13-14 (1935). In interstate water pollution disputes the law of another State is not an alternative possible law.

V

CONCLUSION

For the foregoing reasons the petitions for writs of certiorari should be denied.

Respectfully submitted,

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No. 84-21

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

WILLIAM J. SCOTT, on his own behalf and on behalf of all persons similarly situated,

Petitioner,

vs.

CITY OF HAMMOND, INDIANA; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; DOUGLAS M. COSTLE, Administrator of the United States Environmental Protection Agency; and the HAMMOND-MUNSTER SANITARY DISTRICT,

Respondents.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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RESPONDENTS HAVE FAILED TO ADDRESS THE SERIOUS CONSTITUTIONAL CONTRADICTIONS CREATED BY THE COURT OF APPEALS DECISION BELOW

The responses to the petitions for certiorari[1] evoke the confusion of a famous Abbott and Costello dialogue: "Who's on first? What's on second?" On the one hand respondents and the Court of Appeals explicitly acknowledge that nothing in the Constitution or the Clean Water Act prevents the application of state law to this action and that a state court applying state law can award tort damages and injunctive relief more stringent than required by the Clean Water Act. In virtually the same breath, respondents argue that the Constitution prohibits the application of state law, and that this Court should disregard the clear intent of Congress that state law should govern actions charging tortious conduct by dischargers.

Stripped of all hyperbole, this is nothing more than a suit by a citizen of one state against a citizen of another state for tortious injury. The federal Clean Water Act clearly does not provide a remedy for tortious conduct; the state laws of both Indiana and Illinois do. It is undisputed by any of the parties that Congress intended that actions for the tortious conduct of dischargers be governed by state law, not federal law.

The responses to the petitions for certiorari seek to obscure these simple facts with grand but vague pleas to concepts of state "sovereignty" and "federalism". Yet it is federalism—as expressly embodied in the Tenth Amendment—that preserves to the states the power to regulate harmful conduct, where such power is not preempted by federal law.

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[1] Hammond Respondents' Brief In Opposition To The Petitions For Writs of Certiorari To The United States Court of Appeals For the Seventh Circuit in Nos. 84-21 and 84-38 and Brief In Opposition To the Petition For A Writ of Certiorari filed by the Milwaukee Respondents in No. 84-38.

There is no question that a citizen of Indiana could bring an action based in tort against Hammond under Indiana law for the same conduct as occurred in this case. Under the law declared by the Seventh Circuit and by this Court in *Middlesex County Sewerage Authority* v. *National Sea Clammers Association,* 453 U.S. 1 (1981), nothing in the Clean Water Act or the Constitution prevents the Indiana citizen from seeking damages and injunctive relief more stringent than the Clean Water permit requirements under Indiana state tort law. See decision below at App. A-21 n.6. The fact that the medium, here Lake Michigan, is regulated by federal law does not preclude the application of state law to tortious conduct causing injury to an Indiana citizen. The state law is used to determine both liability and remedy. The remedy can be damages and injunctive relief more stringent than the permit issued under the Clean Water Act, where the restrictions in the permit are insufficient to prevent continuing injury.[2]

Further, there appears to be common agreement by both the Seventh Circuit and by respondent Hammond that the injured *Illinois* citizen could bring an action grounded in tort against Hammond under Indiana *state* law.

> Nothing in our decision precludes the application of Wisconsin or *Indiana law* by state or federal courts in one of those states at the suit of out of state parties affected by discharges in that state.
>
> Court of Appeals decision App. B-3.

> The Court of Appeals also correctly recognized that nothing in *Milwaukee I* or the FWPCA prevented someone from asking the courts of a state in which the discharges were being made to apply *its law* to those discharges. This state remedy was specifically preserved in FWPCA section 510 (33 U.S.C. Section 510).
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> Respondent Hammond's brief at 7.

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[2] Contrary to popular belief, the permit system as administered under the Clean Water Act currently permits raw sewage and raw industrial chemicals to be discharged out of municipal sewers as "best practical technology".

> Also, more stringent relief can be sought *under Indiana law* in Indiana courts.
>
> Respondent Hammond's brief at 8.

Thus both the Court of Appeals and the respondent Hammond agree that there is nothing in the Constitution or the Clean Water Act which precludes the application of *state* tort law to determine both liability and remedy in a suit by either the Indiana or the Illinois victim. Moreover, Hammond and the Court of Appeals acknowledge that Congress explicitly left such remedies for tortious discharges to determination by state law--not federal law.

If neither the Constitution, nor the Clean Water Act prohibit the application of state law in this controversy as acknowledged by both the Court of Appeals and Hammond, the Tenth Amendment to the Constitution and the Rules of Decision Act require the federal courts to apply state law in this controversy. *Erie* v. *Tompkins,* 304 U.S. 64 (1938). Moreover, unless some magical federal choice of state law rule can be gleaned from the Constitution or the Clean Water Act, the choice of law rules of the state in which the district court sits must be used to determine which state law applies. *Klaxon* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487 (1941).

Having expressly agreed that *state* tort law (albeit Indiana) is available to Petitioner, an Illinois citizen, respondent Hammond does a complete logical reversal. Hammond claims that under footnote 6 of *Milwaukee I* only federal law, not state law can apply:

> Any disputes arising from conflicting resource uses permitted by different States can only be resolved through *federal* law.
>
> Respondent Hammond Brief at 6-7.

This statement—that only federal law, not state law, can govern this dispute—is directly contradictory to Hammond's and the Court of Appeals' acknowledgment that Indiana state law could

be used to determine liability and remedy in this controversy. The statement contradicts the express intent of Congress that state law govern liabilities and remedies for tortious conduct, and that such state law not be preempted by federal law.

Moreover, if as Hammond contends, there is some unwritten constitutional rule which prohibits the application of state tort law to this controversy, the Court of Appeals erred in holding that Indiana state tort law remedies were available. If the Constitution somehow precludes the application of state law to this dispute, there is no basis for applying either Illinois or Indiana state law. Any such constitutional prohibition applies with equal force to the law of either state—Illinois or Indiana.[3]

But such a holding would create more constitutional problems. If, as Hammond concedes, a citizen of Indiana could invoke state tort law to seek damages and injunctive relief, a court declared doctrine that an Illinois citizen was barred from invoking state tort law, in the same case, would clearly run afoul of the Privilege and Immunities Clause. U.S. Constitution, art. IV, sec. 2, cl. 1.

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[3] Whenever the tortious acts of Hammond are challenged, Hammond wraps itself in claims of psuedo "sovereignty". But if this concept of "sovereignty" is somehow embodied in the Constitution, overriding the framework of the Tenth Amendment and the Full Faith and Credit Clause, the pseudo sovereignty of Illinois is equally threatened by application of Indiana law to the dumping of sewage and grease onto Illinois territory. The whole pseudo sovereignty issue is simply a makeweight. There is no difference between applying the law of the victim's state to state officials who cause injury in the victim's state in auto or other physical torts and applying the victim's state law to non-state officials or private citizens dumping sewage onto Illinois beaches. Certainly, the "sovereignty" of the State of Nevada was even more at stake in *Nevada* v. *Hall*, 440 U.S. 410, *rehearing den.*, 441 U.S. 917 (1979), and the "sovereignty" of the State of Indiana, was even more at stake in *Maroon* v. *Department of Mental Health*, 411 N.E.2d 404 (Ind. App. 1980).

Moreover, such a holding would fly in the face of the expressed Congressional intent that state tort law was not preempted by the Clean Water Act and should be applied. We thus face the situation where a footnote dictum in this Court's *Milwaukee I* opinion is being used as the lever for negating the express Congressional allocation of power between the federal government and the states as set forth in the Clean Water Act.[4] Indeed, if footnote 6 is really a constitutional mandate instead of a footnote dictum, it is doubtful that Congress had the constitutional authority to direct the application of state law to tort disputes as state law.

In a brief rife with internal contradiction, respondent Hammond argues that the Constitution does—and does not—prohibit the application of state law to this controversy. If this Court accepts the position taken by the Court of Appeals and one of Hammond's positions—that nothing in the Constitution or the Clean Water Act prohibits the application of state tort law to this controversy—then the application and choice of state law must be governed by the Tenth Amendment, the Rules of Decision Act and *Erie*. If this Court accepts the contradictory position also articulated by Hammond—that some unwritten constitutional dogma prohibits the application of state law—then there is really only one way to honor the Congressional intent that state tort law apply, and the Court of Appeals decision that Indiana law be applied to this controversy.

This Court could declare that the "state" tort law preserved by Congress is, in reality, federal law which selectively incorporates state tort law under the aegis of the Clean Water Act. See the cases cited at p. 22 of the Petition in this case. But

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[4] As this Court has acknowledged, the passage of the Act and the consideration of the issue of state vs. federal law for tort actions was predicated on the then outstanding opinion of this Court in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), which followed *Erie*.

as described at pp. 22-26 of the Petition, such federalization of state tort law would create a whole raft of ancillary problems which neither Congress nor this Court intended.

Indeed, the strange constitutional argument urged by Hammond has already spawned bizarre principles of venue, *in personam* jurisdiction, and limits on judicial power. At pp. 11-12 of Hammond's response, Hammond tells this Court that an Illinois court (or by implication a federal district judge sitting in a diversity case in Illinois), cannot be trusted to apply Indiana law to this controversy. Acceptance of this preposterous claim would ravage the foundations of our constitutional system in which each state and federal court is duty bound to faithfully apply whatever state law is deemed applicable.

Further, Hammond conveniently ignores several facts about this suit. Hammond ignores the distinction between liability and choice of remedy.[5] Further, Hammond ignores the fact that the remedies sought by Scott include both damages and injunctive relief. Even as to injunctive relief, Hammond ignores a well-established body of case law that allows a court in one jurisdiction to order actions in another jurisdiction where, as here, there is *in personam* jurisdiction over the defendant.[6] Finally, Hammond acknowledges that an Indiana

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[5] *Davis* v. *Passman*, 442 U.S. 228 (1979); *City of Evansville, Ind.* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1019 (7th Cir. 1979), *cert. denied sub nom., Louisville and Jefferson County Metropolitan Sewer District* v. *City of Evansville, Ind.*, 444 U.S. 1025 (1980).

[6] It has long been recognized that once courts possess *in personam* jurisdiction over the defendant, the Court has the power to order the defendant to perform remedial acts outside the territorial jurisdiction of the Court. See, *The Salton Sea Cases* (*California Development Co.* v. *New Liverpool Salt Co.*), 172 F. 792 (9th Cir.), *cert. denied*, 215 U.S. 603 (1909); *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 289 (1952); E. Mesner, *Jurisdiction of A Court of Equity Over Persons To Compel the Doing of Acts Outside The Territory Limits of the State*, 14 Minn. L. Rev. 494 (1930); Restatement (Second) of Conflict of Laws, Section 53 (1971).

court applying its own tort law could impose requirements more stringent than does the federal law. Under diversity jurisdiction, what possible theory prohibits a federal district court in Illinois, or an Illinois state court, from applying Indiana law in a similar fashion—where, as here, *in personam* jurisdiction exists in Illinois?

Hammond's position becomes even more preposterous when it asks this Court to disregard the very Indiana state choice of law rule which would govern this case. (Hammond response, p. 13.) In *Maroon* v. *Department of Mental Health,* Indiana officials released a homicidal mental patient who crossed the state line into Illinois and killed an Illinois citizen. In a wrongful death action against Indiana state officials for the wrongful death in Illinois, the Indiana court held that Illinois law would apply under the *lex loci delicto* rule followed by Indiana. Hammond would have the federal court reject the state choice of law rule and in its place dictate a federal choice of law rule mandating the application of the law of the tortfeasor's state.

CONCLUSION

Like the sorcerer's apprentice, the Court of Appeals' decision has spawned a phalanx of constitutional anomalies sweeping aside a well-ordered constitutional and statutory framework for choice of law, *in personam* jurisdiction, and venue. It is essential that this Court grant the petitions for certiorari and restore order.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM J. SCOTT, PETITIONER

v.

CITY OF HAMMOND, INDIANA, ET AL.

STATE OF ILLINOIS, ET AL., PETITIONERS

v.

CITY OF MILWAUKEE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether federal law has preempted the availability of a suit under the law of one state to abate an out-of-state point source discharge into interstate waters.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-21

WILLIAM J. SCOTT, PETITIONER

v.

CITY OF HAMMOND, INDIANA, ET AL.

No. 84-38

STATE OF ILLINOIS, ET AL., PETITIONERS

v.

CITY OF MILWAUKEE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

On October 1, 1984, the Court invited the Solicitor General to express the views of the United States in these cases.

STATEMENT

1. The decision of the court of appeals involves three different suits, two by the State of Illinois (and related parties) and one by an Illinois citizen, seeking relief under Illinois state law for out-of-state pollution discharges into Lake Michigan.

a. In 1971, Illinois invoked this Court's original jurisdiction to enjoin the City of Milwaukee and certain other Wisconsin municipal corporations (Milwaukee) from polluting Illinois' shores through the discharge of sewage into Lake Michigan. This Court declined to exercise its original jurisdiction. 406 U.S. 91 (1972) (*Milwaukee I*). The Court explained that the federal common law of nuisance provided Illinois with a remedy for interstate water pollution, and it found that the case should be brought in federal district court. *Id.* at 108.

Shortly thereafter, Illinois (later joined by Michigan (see Pet. App. A4)) filed a complaint for abatement of the discharges in the United States District Court for the Northern District of Illinois, invoking the federal common law of nuisance and also raising two state law claims.[1] Illinois prevailed at trial on "all three counts" (Pet. App. P25). The court of appeals affirmed in part on federal common law grounds. 599 F.2d 151 (1979); Pet. App. J1-J49.[2] This Court reversed, concluding that the 1972 amendments to the Clean Water Act (CWA or FWPCA), 33 U.S.C. 1251 *et seq.*, had displaced the previously recognized federal common law remedy. 451 U.S. 304 (1981) (*Milwaukee II*).[3] The case was remanded to the court of appeals.

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[1] The state law claims were based on the Illinois Environmental Protection Act, Ill. Rev. Stat. ch. 111½, §§ 1001 *et seq.* (1977) (see Pet. App. U1), and Illinois common law.

[2] The court of appeals did not address the state law claims, noting that "it is federal common law and not state statutory or common law that controls in this case" (599 F.2d at 177 n.53; Pet. App. J48 n.53).

[3] Illinois had filed a cross-petition for certiorari addressing the state law issues and seeking reinstatement of the district court judgment. That petition was denied. 451 U.S. 982 (1981).

b. In 1980, Illinois brought suit in Illinois state court against various parties connected with the City of Hammond, Indiana (Hammond) seeking relief for alleged sewage discharges into Lake Michigan. The complaint sought relief on both federal common law and state law grounds. Hammond removed the suit to the United States District Court for the Northern District of Illinois on the ground that the federal common law claim provided federal question jurisdiction. See 498 F. Supp. 166 (1980).

Also in 1980, William J. Scott, an Illinois citizen, brought suit against the City of Hammond in the United States District Court for the Northern District of Illinois alleging pollution of Illinois beaches through the discharge of sewage into Lake Michigan. The complaint sought both injunctive relief and damages from Hammond based on both federal common law and Illinois state law.[4] The district court consolidated Scott's suit with Illinois' suit against Hammond.

Following this Court's decision in *Milwaukee II*, the district court dismissed the federal common law claims. 519 F. Supp. 292 (1981); Pet. App. F1-F12. The court, however, refused to dismiss the state law claims, ruling that the Clean Water Act did not preempt application of state law against an out-of-state

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[4] A third count of the complaint sought relief from the Environmental Protection Agency under the citizen suit provision of the Clean Water Act, 33 U.S.C. 1365. This claim was eventually dismissed by the district court. 530 F. Supp. 288 (1981). The court of appeals reversed that ruling in part; that appellate decision was rendered in a separate appeal that is not the subject of these petitions. See No. 81-2884 (7th Cir. Aug. 16, 1984).

polluter. The court certified its order for interlocutory review under 28 U.S.C. 1292(b), and the court of appeals granted Hammond leave to file an immediate appeal. The appeal of the *Hammond* cases was consolidated with the *Milwaukee* case on remand from this Court (Pet. App. E1-E2).

2. The court of appeals reversed the district court judgments in both the *Milwaukee* and *Hammond* cases (Pet. App. A1-A26), concluding that the Clean Water Act preempted application of Illinois law to out-of-state pollution discharges. The court observed that *Milwaukee I* had relied on the history of federal control over interstate pollution, the sovereign character of the parties, and the need for uniform federal decisions in the area, to announce a federal common law nuisance remedy for transboundary water pollution claims (Pet. App. A9-A11). The court further noted that subsequent appellate and Supreme Court decisions, including *Milwaukee II*, had either suggested or presumed that state law was an inappropriate vehicle for the resolution of interstate water pollution disputes (Pet. App. A11-A16). The court of appeals concluded (*id.* at A16-A17 (footnotes omitted)):

> The very reasons the Court gave for resorting to federal common law in *Milwaukee I* are the same ~~some~~ reasons why the state claiming injury cannot apply its own state law to out-of-state discharges now. *Milwaukee II* did nothing to undermine that result. * * * Given the logic of *Milwaukee I* and *Milwaukee II*, we think federal law must govern in this situation except to the extent that the 1972 FWPCA (the governing federal

law created by Congress) authorizes resort to state law.

Turning to the Clean Water Act, the court of appeals observed that the Act sets forth a comprehensive water pollution policy that contemplates active state participation (Pet. App. A18-A19). It noted that the Act grants each state significant opportunities to control discharges within its jurisdiction and also to participate in the decisions concerning controlling discharges outside its jurisdiction (*id.* at A19-A20). The court examined with particular care Section 505(e), 33 U.S.C. 1365(e), which preserves the right to seek relief under common law or another statute, and Section 510, 33 U.S.C. 1370, which preserves state regulatory powers. Weighing the "structure of [the] FWPCA," the Act's "emphasis upon the role of the state where the discharge in question occurs," and the "conflict and confusion" that would result from state injunctions of out-of-state pollution, the court concluded that these provisions preserve *only* the rights of states to police pollution discharges within their own boundaries (Pet. App. A21-A22).

The court denied Illinois' petition for rehearing, modifying a footnote of its opinion but specifically refusing the plaintiffs' request for further proceedings on remand under Wisconsin and Indiana law (Pet. App. B1-B3).

ARGUMENT

Petitioners contend that the court of appeals erred in ordering the dismissal of their claims based on Illinois law. The decision below, however, does not conflict with any decision of another court of appeals and correctly follows the principles laid down by this

Court in *Milwaukee I* and *Milwaukee II*. Accordingly, review by this Court is not warranted.[5]

1. The court of appeals correctly held that federal law preempts the application of the law of one state to abate point-source discharges—from a municipal treatment plant regulated under the Clean Water Act—into interstate waters in another state. See Pet. App. A8.[6] The federal preemption of this application of state law was clearly established by this Court's decision in 1971 in *Milwaukee I*. That case held that federal law alone controls the abatement of interstate water pollution, noting that the "overriding federal interest" in the condition of interstate waters compelled the application of federal law. 406 U.S. at 105 n.6. The Court further explained that the long line of federal statutes in the area of interstate water pollution, beginning in 1899 and culminating at that time with the Federal Water Pollution Control Act Amendments of 1948, ch. 758, 62 Stat. 1155, 33 U.S.C. (1970 ed.) 1151 *et seq.*, had preempted state law. Referring to the 1948 Act's abatement procedure, 33 U.S.C. (1970 ed.) 1160, the Court held that "the Act [made] clear that it is federal, not state, law that in the end controls the pollution of interstate

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[5] Illinois notes (84-38 Pet. 13) that the intermediate appellate court in Illinois has held that state law may be invoked to abate a discharge in another state. These decisions, which do not come from the highest court of the state and which were rendered without the benefit of the views of the Seventh Circuit in this case and of this Court in *Milwaukee II*, plainly do not create a conflict that warrants this Court's attention.

[6] This Court has considered this issue once before in connection with a motion for leave to file an original complaint. *Oklahoma* v. *Arkansas*, motion for leave to file denied, No. 93, Orig. (Mar. 7, 1983) (1982 Term). At the Court's request, the United States filed a brief as amicus curiae in that case.

or navigable waters" (406 U.S. at 102 (footnote omitted)).[7] Accordingly, to the extent common law was needed to fill gaps in the federal statutory scheme (which did not provide Illinois with its own right of action to seek cessation of the pollution), the Court concluded that federal common law should be applied, and therefore it remitted Illinois to federal district court to bring a suit for abatement of the nuisance.

The decision in *Milwaukee I* left no doubt that the law of one state could not be relied upon to abate a discharge in another state. The court of appeals reached that conclusion on remand in the *Milwaukee* case itself (599 F.2d at 177 n.53), and this Court denied certiorari on that issue. 451 U.S. 982 (1981). See also *City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1021 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980); *Township of Long Beach* v. *City of New York*, 445 F. Supp. 1203, 1215-1216 (D.N.J. 1978) (dictum). Therefore, the crux of petitioners' contention (see 84-21 Pet. 22-24; 84-38 Pet. 19-20, 23-24) is that intervening events—specifically, the enactment of the Clean Water Act in 1972 and this Court's subsequent decision in *Milwaukee II*—have revived the availability of this state law remedy. This contention is without merit.

In *Milwaukee II*, the Court considered the question whether the enactment of the Clean Water Act in 1972, a considerably more detailed statute than the 1948 Act, "displaced" the federal common law of nuisance that had formed the primary basis for Illinois' suit in district court. The Court held that it

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[7] In a footnote, the Court rejected the "contrary indication" in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 n.3 (1971). 406 U.S. at 102 n.3; see also *Milwaukee II*, 451 U.S. at 327 n.19.

had, characterizing the scope of the 1972 Act as "comprehensive" and concluding that it "occupied the field" (451 U.S. at 317). The Court explained that the permit system established by the Act for point source discharges addressed the problems of effluent limitations and sewer overflows that are the focus of this litigation; it concluded that there was no " 'interstice' * * * to be filled by federal common law" (*id.* at 323).

As noted above, *Milwaukee II* did not specifically address the possibility that Illinois could maintain an action under Illinois law for the discharges in Wisconsin since the Court denied Illinois' cross-petition on that issue. See 451 U.S. at 310 n.4. The opinion lends no support, however, to the contention that such state law remedies were revived by the decision in *Milwaukee II*, and, indeed, the discussion there strongly suggests that such remedies are not available. The Court noted that the creation of a federal common law, like that recognized in *Milwaukee I*, is ordinarily premised on " 'a significant conflict between some federal policy or interest and the use of state law' " (451 U.S. at 313, quoting *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)), and further stated that "if federal common law exists, it is because state law cannot be used" (451 U.S. at 313 n.7). Thus, the Court reiterated the premise of *Milwaukee I* that the federal interest in interstate waters precluded the use of one state's law to abate discharges occurring in another state.

This Court's rationale for holding in *Milwaukee II* that the CWA displaced the federal common law of nuisance provides no ground for inferring that a state law action has been revived. The Court explained that the CWA addressed one of the major concerns that

underlay *Milwaukee I* by providing Illinois a "forum in which to protect its interests" through participation in the permit process. 451 U.S. at 325. The Court found that the 1972 CWA "provided ample opportunity for a State affected by decisions of a neighboring State's permit-granting agency to seek redress" (*id.* at 326). Indeed, quite apart from *Milwaukee I*, the Court's conclusion in *Milwaukee II* that Congress intended the CWA to be "comprehensive" and that it "occupied the field" (451 U.S. at 317) provides a strong basis for concluding that state law suits to abate out-of-state discharges are preempted. See, *e.g.*, *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 9.

Illinois contends (Pet. 20, 23) that state law has been revived on the theory that the federal common law that preempted it has now been displaced. That contention is based on a faulty premise, namely, that preemption resulted from something unique about the federal *common law*. *Milwaukee I* held, however, that federal interests and federal law generally (not the federal common law of nuisance alone) left no room for applying state law to abate out-of-state discharges. The decision in *Milwaukee II* that the new federal statutory scheme was so comprehensive that it left no room for federal common law did not alter the basic truth that federal law has preempted state law in this regard. In the words of the district court that has considered and rejected a post-*Milwaukee II* state law claim:

> It would be bizarre to hold that state law claims against out-of-state dischargers were preempted by federal common law but not by the comprehensive federal statute that has in turn preempted that federal common law. Uniformity in

> the interstate regulation of pollution is a concern of the same magnitude whatever form the federal response may take.

Chicago Park District v. *Sanitary District*, 530 F. Supp. 291, 293 (N.D. Ill. 1981) (footnote omitted), appeal pending, No. 81-2896 (7th Cir.).

Moreover, permitting a suit under state law to abate a discharge in another state undermines the policies underlying the comprehensive federal scheme for controlling interstate water pollution. The CWA establishes a "national" pollution control policy (see 33 U.S.C. 1251) that imposes minimum pollution control standards on every state (see 33 U.S.C. 1342). Permitting states to apply their law to abate out-of-state discharges will significantly "impair[] the federal superintendence of the field." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963). The CWA creates a federal-state partnership in the area of interstate water quality, but it is a partnership in which the federal role is dominant. The federal government establishes threshold pollution control requirements (see, *e.g.*, 33 U.S.C. 1311, 1312, 1316, 1317), subject to state decisions to "adopt more stringent limitations through state administrative processes, [or] establish such limitations through state nuisance law, and apply them to *in-state* dischargers." *Milwaukee II*, 451 U.S. at 328 (emphasis added). Under this partnership, the states must defer to the federal government's choice of minimum national requirements, but they reserve the unqualified power to determine to what degree they wish to impose more stringent limitations within their borders. If, as Illinois argues, one state may impose its limitations beyond its borders, this balance of federal and state roles is destroyed. Where several states are

situated on a particular body of water the state that has the most stringent pollution limitations will displace the federal government as the arbiter of minimum pollution control requirements; this result is clearly contrary to the "full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941) (footnote omitted).[8]

In sum, *Milwaukee I* clearly established that federal law has preempted a suit under the law of one state to abate an out-of-state discharge into interstate waters. The reasons underlying that finding of preemption remain fully applicable today and, indeed, appear considerably stronger in light of the substantially more comprehensive federal statutory scheme enacted in 1972. Thus, in the absence of any clear indication in the 1972 Clean Water Act that such a state law remedy should be revived,[9] it seems clear

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[8] The Clean Water Act provides a mechanism for states affected by discharges in other states to participate in the permit issuance process and to bring their objections to the attention of the Administrator of EPA. See 33 U.S.C. 1342(b)(3) and (5); *Milwaukee II*, 451 U.S. at 325-326. These provisions would serve little purpose if a state were free to impose its own standards on a neighboring state regardless of whether the second state was complying with a valid permit.

[9] The Clean Water Act, of course, does preserve state law to a limited extent, but, contrary to petitioners' contention (84-21 Pet. 17-18; 84-38 Pet. 24-28), it does not evince an intent to revive the availability of state law to abate a discharge in another state. Section 510 of the Act, 33 U.S.C. 1370, expressly permits a state to set pollution standards more restrictive than the federal standard. This Court has recognized, however, that this authority is limited to discharges occurring within the borders of that state. *Milwaukee II*, 451 U.S. at 328. Indeed, Section 510(2), 33 U.S.C. 1370(2), was adopted from an almost identical provision of the 1948 Act, as amended, 33 U.S.C. (1970 ed.) 1151(c), which the court in *Milwaukee I*

that the court of appeals correctly concluded that federal law continues to preempt the application of state law to abate a discharge in another state. See, *e.g.*, *San Diego Unified Port District* v. *Gianturco*, 651 F.2d 1306, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).[10]

In the final analysis, petitioners' complaint here is largely that the permits that have been issued under the Clean Water Act are inadequate. See Pet. App. A20 n.5. But that dissatisfaction with the permits alone cannot be a basis for permitting petitioners to bring suit under their own state law to abate a discharge in another state. See *Milwaukee II*, 451 U.S. at 324-325 n.18. Rather, any change in the control of the discharge should be made through the system created by the federal statute, either by a change in

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found insufficient to establish an intent by Congress not to preempt state law in this regard. See 406 U.S. at 102. The "savings clause" of the citizen suit provision of the CWA, Section 505(e), 33 U.S.C. 1365(e), similarly does not evince any intent to revive a state law remedy to abate out-of-state discharges. That remedy was plainly preempted in 1971 in *Milwaukee I* and hence could not be "saved" in the 1972 CWA. See *Milwaukee II*, 451 U.S. at 328-330; Pet. App. A21-A24.

[10] This case does not present the question whether, in light of the fact that this Court's decisions in *Milwaukee* concerned only an action to *abate* a nuisance, a state law remedy might remain for *damages* caused by an out-of-state discharge. The *Milwaukee* suit did not seek damages relief at all (84-38 Pet. 4-5). While Illinois' suit against Hammond apparently did seek damages (see Hammond Br. in Opp. 3), Illinois does not appear to have ever argued that its damage claim should be treated differently than its claim for injunctive relief. Scott's claim for damages was rejected, quite apart from the preemption question, on the state law ground that he "has not alleged harm of a kind different from that suffered by other members

the discharge permit or by the application of more stringent controls by the state of discharge.[11]

2. The court of appeals suggested (Pet. App. B3 n.2, A23) that a suit based on the law of the state of discharge would not be preempted by federal law.[12] As noted in our brief (at 14-15) in *Oklahoma* v. *Arkansas*, *supra*, we believe this suggestion to be correct. The Clean Water Act plainly contemplates that a state may hold dischargers *within its borders* to a higher standard than required by federal law, and

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of the public," which the court held was a prerequisite to recovery for a public nuisance (Pet. App. A24-A25). Whether this holding correctly interpreted the Illinois Constitution (see 84-21 Pet. 11) is not a question for this Court. Thus, the petitions in this case do not raise the question whether suits for damages premised upon state law have been preempted to the same extent as suits to abate a nuisance, and we do not address that question here.

[11] Illinois did not participate in the process surrounding the issuance of the Milwaukee permits (Pet. App. A20 n.5).

[12] Petitioners seize upon this suggestion (84-21 Pet. 9-10, 12-16; 84-38 Pet. 11, 15-17) to argue that this is simply a choice-of-law case and therefore the court of appeals should have applied Wisconsin and Indiana choice-of-law rules. Petitioners' contention completely misses the mark. This case is not an ordinary tort suit; it involves the question of pollution of interstate waters, which this Court repeatedly has held to require special treatment. There is not presented a choice-of-law question in the sense considered in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). Rather, it is clear that federal law governs (see *Milwaukee I*, 406 U.S. at 105 & n.7; *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938)), and state law is preempted to the extent required by federal law. For the reasons discussed above, the federal statutory scheme here has left room for a suit under state law against a discharger in that state, but not in another state.

therefore a suit under state law against a discharger in the same state does not interfere with the federal statutory scheme. See, *e.g.*, *Ancarrow* v. *City of Richmond*, 600 F.2d 443, 445 (4th Cir. 1979).

In light of this suggestion by the court of appeals, petitioners object (84-21 Pet. 8; 84-38 Pet. 16-18) to the court's dismissal order, contending that the court of appeals should either have decided the case itself in accordance with Indiana or Wisconsin law or remanded to the district court with instructions to do so. The court of appeals, on the other hand, evidently believed the plaintiffs should proceed, if at all, by new actions in the state (or states) of discharge. In our view, the correctness of this procedural ruling, which was raised initially on petitions for rehearing in the court of appeals (see Pet. App. B3), presents no issue warranting the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

WILLIAM J. SCOTT, on his own behalf and on behalf of all persons similarly situated,

Petitioner,

vs.

CITY OF HAMMOND, INDIANA; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; DOUGLAS M. COSTLE, Administrator of the United States Environmental Protection Agency; and the HAMMOND-MUNSTER SANITARY DISTRICT,

Respondents.

PETITIONER SCOTT'S REPLY TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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The Position of the United States Would Destroy Essential State Law Tort Protection and the Historical Constitutional Framework Upon Which That Protection is Based

In contrast to societies that settle their disputes with machine guns and grenades, we in the United States quite proudly point to our constitutional tradition under a "Rule of Law". The hallmark of our "Rule of Law" has been the concept of *reasoned* decisionmaking as opposed to decisions made by caprice and arbitrary fiat. Decisions and positions taken by our governmental institutions—especially the judiciary—must be based on logical, internally consistent reasoning.

To the public and the lawyers who practice before this Court, the ultimate protector of this mandate for reasoned decisionmaking has been the Supreme Court of the United States. Yet the incredible propositions put forth by the amicus brief of the Solicitor General suggest that the motto of this Court should be changed to "Abandon reason, all ye who enter here". Acceptance of the Seventh Circuit's position, as endorsed by the Solicitor General, will lead this Court away from the realm of reason into a Louis Carroll fantasy world of frightening dimensions.

The issue here, as framed by this Court's decisions in *Milwaukee I*[1] and *Milwaukee II*[2] is whether any state law can be applied to impose liability and provide a remedy[3] for interstate torts where:

1) the tortfeasor is in one state;
2) the tort victim is in another state; and,
3) the tortious conduct crosses state lines through the air or the water.[4]

To illustrate the extreme nature of the Solicitor General's position, this reply describes three legal frameworks which have been applied to this issue: 1) the historic framework prior to *Milwaukee I;* 2) the framework defined from reading the footnotes of *Milwaukee I* and *Milwaukee II;* and, 3) the framework created by the Seventh Circuit below and endorsed by the Solicitor General. To give the analysis more currency, petitioner asks the Court to consider these frameworks as applied to the following all too real hypothetical question.

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[1] *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972).

[2] *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981).

[3] Petitioners' repeated reminders that the issues of liability and remedy are distinct continues to fall on deaf ears. *Davis* v. *Passman*, 442 U.S. 228 (1979); *City of Evansville, Ind.* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1019 (7th Cir. 1980).

[4] The holding of *Milwaukee I*—whatever that holding is—applies equally to air pollution. *See Washington* v. *General Motors Corporation*, 406 U.S. 109, 112, n.2 (1972), issued the same day as *Milwaukee I*.

How would these three legal frameworks apply in the event an accident like the Bhopal, India release occurred in the United States? An identical twin to the Bhopal methyl isocyanate plant exists in Institute, West Virginia—not far from the borders of Kentucky and Ohio. What if methyl isocyanate was released as a liquid from the Institute plant and had vaporized, and the vapor cloud traveled north and west into communities in Ohio and Kentucky? What if thousands of Kentucky and Ohio citizens were killed by the poison cloud? Alternatively, what if the deadly liquid poison remained in liquid form and traveled instead from the Institute plant into the Kanawha River, and thence down the Kanawha into the Ohio River, poisoning citizens in Kentucky and Ohio who drank the poisoned water? Could the Ohio and Kentucky victims bring a tort action under state law seeking damages and injunctive relief?[5]

Under the three different frameworks discussed below, the injured citizens of Ohio and Kentucky and the relatives of the dead Ohioans and Kentuckians would have dramatically different legal rights. Similarly, the law enforcement rights of Kentucky and Ohio state law enforcement agencies would also be dramatically different—depending on which framework applied. The three frameworks would provide relief to the Ohio and Kentucky victims, and to the law enforcement agencies of Kentucky and Ohio as follows.

A.

The Historical Framework Prior to *Milwaukee I*

Prior to *Milwaukee I*, the law on this subject was very clear. State law governed the issue of civil and criminal liability. (See cases cited in Petitioner Scott's petition at pp. 14-15 and in the Court of Appeals opinion at A-17, n.3). And the choice of state law was governed by choice of law rules of the

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[5] Petitioner Scott's action seeks both damages and injunctive relief. As noted above, the cause of action is the same under either form of relief and is independent of the relief sought.

forum state as long as these rules were consistent with due process. *Klaxon* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3 (1975).

Under this historic framework, there is no question that the injured Ohio and Kentucky citizens could bring their actions against the owners and operators of the West Virginia plant in the state courts of Ohio and Kentucky, respectively. Alternatively, they could bring the actions in the federal district courts in Kentucky and Ohio under diversity jurisdiction and venue would lie in such courts under 28 U.S.C. Section 1391. Under governing principles of *in personam* jurisdiction, it is clear that the Kentucky and Ohio courts, be they state or federal, would have *in personam* jurisdiction over the plant owners and or operators in West Virginia.[6] Finally, the choice of the substantive state tort law to be applied would be determined by the choice of law rules of the forum state.

Similarly, in the controversy below, the state courts of Illinois would have *in personam* jurisdiction against the out-of-state tortfeasor and would apply whatever state law was determined to be appropriate under Illinois choice of law rules. Further, the law is equally clear that a federal district court in Illinois in a diversity case brought on a state law claim would apply the choice of law rules of the forum state. Finally, venue would be proper in the federal district court in Illinois.

B.

The *Milwaukee I* "Holding" as Illuminated by *Milwaukee II*

This Court's decision in *Milwaukee I* as "illuminated" by this Court's decision in *Milwaukee II* has thrown an irrational monkeywrench into this carefully crafted historical framework. Frankly, lawyers' attempts to divine the "holding" of *Milwaukee I* as to the issue now before this Court is akin to Ulysses

[6] The Kentucky and Ohio law enforcement agencies could bring criminal charges against the West Virginia plant operator under Kentucky and Ohio law.

and his men reading goat entrails to divine the intention of the gods. The "true meaning" of *Milwaukee I* and its obscure footnotes on the issue of preemption of state law for interstate air and water pollution torts—and the constitutional or statutory basis for such preemption—is delphic.

Nevertheless, the cryptic footnotes of *Milwaukee I* have been given some illumination by another set of less than clear footnotes in *Milwaukee II*.

> If state law can be applied, there is no need for federal common law; if federal common law exists, *it is because state law cannot be used.*
>
> *Milwaukee II* at p. 313, n.7 (emphasis added).

The asserted import of this *Milwaukee II* footnote dictum, in combination with footnotes 6 and 9 of the *Milwaukee I* opinion, is that federal law, presumedly based in the Constitution, prohibits the application of state tort law to determine liability or establish remedy in cases of interstate air or water pollution torts. Nowhere is the constitutional provision which dictates such preemption identified; nowhere in either *Milwaukee I* or *Milwaukee II* are the implications of such a holding discussed or analyzed.

If some unspecified constitutional mandate preempts the application of state law to interstate air and water pollution torts, such preemption clearly extends to application of all state law. If in the words of *Milwaukee II*, federal law must govern the issue, "it is because state law cannot be used. "[7]

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[7] Indeed, one of the asserted purposes behind such preemption was to prevent one state's law from being applied to the "sovereign" interests of a neighboring state. In the field of interstate air and water pollution torts—unlike the myriad cases of interstate tort by other instrumentalities—there appears to be some hoary vestigial concept of 50 independent feifdoms ready to wage war unless federal law is applied to the issue of tort liability and remedy. Clearly this alleged purpose in preempting state law would be equally violated by applying the tortfeasor's law against the victim state and in requiring the victim state to seek relief in the tortfeasor state courts.

However, reading cryptic footnotes as if they were well-crafted declarations of major changes in an entire field of law is a dangerous exercise that can produce catastrophic results. By "holding" that federal law must determine tort liability for interstate air and water pollution torts in *Milwaukee I*, and then by holding in *Milwaukee II* that Congress in the passage of the Clean Water Act preempted any federal common law tort remedy, this Court has wiped out all tort law relief for victims of interstate air or water pollution.

Applying the *Milwaukee I* "holding" to the hypothetical release of methyl isocyanate, the injured Kentucky and Ohio citizens would be barred from any tort action under state law.[8] Under the cryptic footnote "holding" of *Milwaukee I* as illuminated by the footnotes of *Milwaukee II*, no state law can apply to interstate air and water pollution torts. See *City of Evansville, Inc. v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1018 n.30 (7th Cir. 1979). Since *Milwaukee II* held that no federal common law tort action survived the passage of the Clean Water Act (and implicitly, the Clean Air Act) and since Congress did not provide a tort remedy for interstate pollution torts in either the Clean Air Act or the Clean Water Act, the Kentucky and Ohio citizens would be without any tort relief. Similarly, under the same reasoning, Ohio and Kentucky law enforcement officials would be powerless to invoke Kentucky or Ohio criminal laws against the perpetrators of the act.

Such a federal law preemption would indeed be ironic in light of Congress's expressed intention to preserve state law when passing the Clean Air Act and Clean Water Act. Congress clearly intended to preserve state tort law in its historical framework and certainly expressed no desire to restrict the criminal law jurisdiction of the states.

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[8] By barring the state law cause of action, the *Milwaukee I* holding bars damage relief as well as any injunctive relief.

C.

The Seventh Circuit Variant

Trapped by the divined meaning of the *Milwaukee I* and *Milwaukee II* footnotes, and the anomalies created by adherence to such footnotes, the Seventh Circuit, with the endorsement of the Solicitor General, has built a second story to the *Milwaukee I* house of cards which is even more bizarre.

Having asserted that *Milwaukee I* declared a constitutional prohibition against the application of state law which was by implication reaffirmed in *Milwaukee II*, the Solicitor General then uses the last two pages of his brief to say that the petitioners here do have a cause of action under state tort law—but only under the state law of the tortfeasor's state and only in the federal or state courts in the tortfeasor's state (Solicitor General's brief at 13, 14)!

Under the variation announced by the Seventh Circuit below, and endorsed by the Solicitor General, the injured Ohio and Kentucky citizens could bring tort actions under state law, but only under West Virginia state law and only in West Virginia state courts or federal courts in West Virginia! Beyond the bizarre holding that only West Virginia tort law could apply, the Seventh Circuit's decision would bar Ohio and Kentucky courts (and federal district courts in Kentucky and Ohio) from applying West Virginia law and would disregard the express venue provisions of 28 U.S.C. Section 1391(a) which allows an action based on diversity of citizenship to be brought in the district where the plaintiff resides or where the cause of action arose. Needless to say, under the Seventh Circuit variant, Ohio and Kentucky law enforcement officials would be powerless to seek criminal sanctions under Ohio and Kentucky law against the perpetrators of the release.

The illogic of the *Milwaukee I* footnote "holding" that no state law can be applied in this situation is now compounded by the claim that state law can apply, but only if it is the

tortfeasor's state law and only if applied in the tortfeasor's state. Given the purported holding of *Milwaukee I* that all state law was preempted, where did this state law come from?

The Solicitor General does not say whether this state tort law claim is grounded in federal law or is truly state law. If it is grounded in federal law through some sort of unstated incorporation by Congress as a federal rule of decision under the Clean Water Act (see Petitioner Scott's petition, at p. 22), such a federal version of state tort law would create vast new problems. (See Petitioner Scott's petition, at pp. 22-25).

If the state law claim endorsed by the Solicitor General is not based on federal law but is truly state law, again, where did it come from? Clearly, the Solicitor General does not believe that the Congress revived the state law claim with the passage of the Clean Water Act.

> This Court's rationale for holding in Milwaukee II that the CWA displaced the federal common law of nuisance provides no ground for inferring that a state law action has been revived.
>
> Solicitor General's brief p. 8.[9]

If the state tort law cause of action did not come from the Clean Water Act, it must have existed prior to the Clean Water Act. If so, the Solicitor General is arguing that this Court's footnote holding in *Milwaukee I* did not preempt all state law tort causes of action, only causes of action under the victim's state law. Such an interpretation of *Milwaukee I* is simply preposterous. Either the Constitution preempted the application of all state law or no state law. Selective preservation of the tortfeasor state's law while destroying the victims state's law and judicial authority was not the holding of *Milwaukee I*.

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[9] It is clear that Congress is not empowered to create state law. Congress can only remove federal impediments to preexisting state law or alternatively adopt state law rules as federal rules of decision.

Equally without explanation, the Solicitor General endorses the Seventh Circuit's rewriting of the law of choice of law, *in personam* jurisdiction and venue in a diversity case. Concomitant with its *ex cathedra* revival of a state law claim under the tortfeasor's state law,[10] the Seventh Circuit also rewrote the United States Code as to venue and the due process clause as to *in personam* jurisdiction.

If the Seventh Circuit's position is correct and is approved by the Solicitor General, the only place this plaintiff can bring a diversity action under the tortfeasor's state law is the federal court in the tortfeasor's state. This would be a judicial rewrite of the Judicial Code's venue statute, 28 U.S.C. Section 1391(a). Under the theory supported by the Solicitor General, the plaintiff could only bring an action in the district where the defendants reside. In contrast, Section 1391(a) allows a diversity action to be filed either in the district where the defendant resides or where the plaintiff resides or where the cause of action arose.

Similarly, the position endorsed by the Solicitor General also rewrites the law of *in personam* jurisdiction. Under the Seventh Circuit's decision, the state law claim under the tortfeasor state's law can only be brought in the state and federal courts of the tortfeasor's state. This would completely rewrite the law of *in personam* jurisdiction.

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[10] Nowhere does the Solicitor General explain the Seventh Circuit's refusal to apply Indiana choice of law rules to Petitioner Scott's claim—which choice of law rules dictate application of Illinois law. Further, nowhere does the Solicitor General explain the Seventh Circuit's use of the Restatement of Torts as a "state law ground" to deny Scott's damage claim. Use of the Restatement to bar a claim for damages allowed by the Illinois Constitution is not authorized by either Illinois law or Indiana law.

Conclusion

The preposterous results arising from application of the frameworks of *"Milwaukee I/Milwaukee II"* and "the Seventh Circuit Variant" are indefensible from the standpoint of constitutional history or logic. This court must clear the air and reestablish the historic framework of reasoned principles governing this subject.

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